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No. 92-1983

In The

Supreme Court of the United States

October Term, 1992

LYNN ANN STEIRER, a Minor, by BARBARA and THOMAS STEIRER, as Guardians and in Their Own Right; DAVID STEPHEN MORALIS, a Minor by THOMAS and BARBARA MORALIS, as Guardians and in Their Own Right,

Petitioners,

v.

BETHLEHEM AREA SCHOOL DISTRICT; THOMAS J. DOLUSIO; ELLEN PAGANO; BARBARA HUTH; JOSEPH McCARTHY; JOHN SPIRK, SR.; RUTH PROSSER; URIEL TRUJILLO; LAWRENCE KISSLINGER; LYNN GLANCY; ROBERT THOMPSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a public school district's requirement of mandatory community service without compensation as a condition of graduation violate the Thirteenth Amendment's prohibition against involuntary servitude and establish an unconstitutional condition?

2) Does a public school district's requirement of mandatory community service as a condition of graduation violate the First and Fourteenth Amendments' protections against compelled affirmance of belief and unconstitutional conditions?

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ORDERS BELOW

The district court decision is contained in *Steirer, et al. v. Bethlehem Area School District, et al.*, 789 F. Supp. 1337 (E.D. Pa. 1992) (App. 29). The decision of the United States Court of Appeals for the Third Circuit is contained in *Steirer, et al. v. Bethlehem Area School District, et al.*, 987 F.2d 989 (3rd Cir. 1993) (App. 1).

JURISDICTION

This Court's jurisdiction arises under 28 U.S.C. § 1254(1). The Third Circuit Court of Appeals issued its decision and entered judgment on March 15, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based on the free speech clause of the First Amendment to the United States Constitution, which states, "Congress shall make no law . . . abridging the freedom of speech. . . . " The First Amendment applies to state and local government bodies by incorporation under the Fourteenth Amendment. Additionally, this action is based on the Thirteenth Amendment to the United States Constitution, which states, "[n]either slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States. . . . "

The relevant statutory provision involved is 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE FACTS AND THE CASE

The mandatory Community Service Program at issue was enacted by the Bethlehem Area School Board on April 30, 1990. The program requires all public high school students to perform 60 hours of unpaid "community service" after school hours, on weekends, or over summer vacations as a requirement of graduation. Students ordinarily choose from a list of pre-approved organizations maintained by the school district in order to complete the requirement. Such organizations include AIDS Outreach, Cedarbrook Nursing Home, Interfaith Peace Resource Council, and Planned Parenthood of North East Pennsylvania. *Steirer*, 987 F.2d at 991 (App. 5).

Students may also submit additional groups for approval but only if the suggested organization "(i) demonstrate[s] [its] intention to promote the welfare of the community; (ii) does not discriminate against any race, religion or sex; and (iii) provide[s] assurances that the organization is free from doctrinal motivation." *Id.* (App. 5). Alternatively, students may submit an "experiential

situation" whereby a student performs community service through an approved plan, but not for a particular organization. *Id.* (App. 5).

In drafting and implementing the program, the school directors described the goals and purposes of the mandatory Community Service Program. Respondent Thompson stated that the program

> should send a clear message that responsibility to the Community is something basic, not something optional like Advanced Music Theory or French IV. . . . We need to enunciate clearly a new set of values in contradiction to the consumer ideal of happiness and fulfillment.

(App. 54.) Respondent Trujillo declared that the adoption of the program was necessary because the

> values that are being gained through the media and through the video stations on TV are material consumption, self-indulgence and narcissism more and more today.

(App. 60.) The Curriculum Course Guide defines the program's objectives as follows:

1. Students will understand their responsibilities as citizens in dealing with community issues.
2. Students will know that their concern about people and events in the community can have positive effects.
3. Students will develop pride in assisting others.
4. Students will provide services to the community without receiving pay.

Steirer, 987 F.2d at 991 (App. 4).

After working the prescribed number of hours, students are required to complete a written Experience Summary Form setting forth where the student performed the service, how many hours were served, what duties were encompassed, what lessons were gained from the experience, and what the student contributed to the program. *Id.* at 992 n.1 (App. 6).

Petitioners are two students and their parents who object to mandatory participation in the Community Service Program. Petitioners Lynn Ann Steirer and David Stephen Moralis are currently enrolled in the Bethlehem Area School District and subject to the program's requirements. While both students have in the past and continue to perform voluntary service in the community, they object to the school district's requirement that they work without pay in the name of community service as a condition of graduation. Petitioners filed suit in federal district court challenging the mandatory Community Service Program as a violation of their rights under the First, Thirteenth, and Fourteenth Amendments. They sought declaratory and injunctive relief against its enforcement as applied to them.

The parties filed cross-motions for summary judgment in the district court and on March 30, 1992, the district court granted defendants' motion in all respects. (App. 29.) Parents and students timely appealed to the Third Circuit and on March 15, 1993, the appeals court affirmed the judgment of the lower court. (App. 2.)

REASONS FOR GRANTING THE WRIT

I. RESPONDENTS' PROGRAM REFLECTS A GROWING NATIONAL TREND TOWARD COERCED COMMUNITY SERVICE RAISING THE NEED FOR CONSTITUTIONAL STANDARDS

School districts throughout the country have adopted various forms of community service programs within their curricula. Maryland has mandated community service for all public high school students in the state, while an estimated 500 local school districts have various mandatory and voluntary programs. *See* "Community Service: An Education in Responsibility," *USA Today*, May 19, 1993, at 9D; *see also, e.g.*, "Maryland Mandates Public Service by Students," *Wash. Post*, July 30, 1992 at A1. It is likely that similar programs will continue to proliferate. Currently, clear constitutional standards do not exist for these programs without which the likelihood of constitutional violations is great. Moreover, the one appeals court that has addressed the constitutional questions raised by these programs seriously misconstrued relevant constitutional provisions and this Court's precedents. It is therefore imperative that this Court establish clear constitutional standards for this growing national trend.

II. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE THIRTEENTH AMENDMENT PROHIBITING INVOLUNTARY SERVITUDE AND THIS COURT'S PRECEDENTS PROHIBITING UNCONSTITUTIONAL CONDITIONS.

The Thirteenth Amendment to the United States Constitution prohibits all forms of slavery *and* involuntary

servitude. While the amendment specifically was aimed at eliminating the vestiges of African slavery within the United States after the Civil War, the amendment goes beyond that and also prohibits all forms of "involuntary servitude" or services rendered against one's will. The appeals court confuses the distinctions drawn by the amendment and rather opts for a "contextual" approach to analyzing the mandatory Community Service Program and the plain language of the Thirteenth Amendment. *Steirer*, 987 F.2d at 1000 (App. 22) (observing that the service program is not akin to African slavery but ignoring separate constitutional concerns of involuntary servitude).

Involuntary servitude is defined as "that control by which the personal service of one man is . . . coerced for another's benefit. . . . " *Butler v. Perry*, 240 U.S. 328 (1916); *see also Bobilin v. Board of Education, State of Hawaii*, 403 F. Supp. 1095 (D. Ha. 1975) (involuntary servitude defined as "a condition of enforced compulsory service of one to another"); *United States v. Lewis*, 464 F. Supp. 1391, 1400 (W.D. Mich. 1986) (noting the "subtler forms of coercion [that] have replaced the blatant methods of subjugation practiced in the ante-bellum south"). By its very terms, the mandatory Community Service Program at issue constitutes servitude. The objectives of the program clearly state that "[s]tudents will provide services to the community without receiving pay." *Steirer*, 987 F.2d at 991 (App. 4).

The appeals court found the program does not amount to involuntary servitude since ostensibly the purpose and benefits of the program primarily inure to the

student with only incidental benefits to community organizations. The appeals court thus creates an exception to the prohibition against involuntary servitude for instances in which the government concludes that the involuntary servitude is for the person's own good.

Such circular reasoning drains the Thirteenth Amendment of meaning. Whether the benefit to community organizations is primary or incidental, students are required to perform 60 hours of services to others without pay. These services are required in all manifestations of the mandatory program whether by making a student work for an approved organization or through an "experiential" situation that nevertheless requires service in some manner to the "community."

The appeals court also concluded that the program is not coercive or involuntary because students who object to mandatory community service have the option to drop out of school, or to complete school but not receive a diploma. *Steirer*, 987 F.2d at 1000 (App. 44). Under the appeals court's ruling, a requirement of community service for public high school students is no different from requiring attorneys to provide a certain number of free legal services or offering prisoners work-release programs to shorten their sentence. *See United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986); *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). A lawyer can choose not to practice law rather than perform *pro bono* services, a prisoner can choose to remain in prison rather than work, and likewise, students can choose not to attend or graduate from Bethlehem schools if they do not wish to perform mandatory community service. The appeals court explained that "[t]he fact that these choices may not

be appealing does make the required labor involuntary servitude." *Steirer*, 987 F.2d at 1000 (App. 26).

The appeals court's reasoning creates an unconstitutional Hobson's choice. By imposing a mandatory community service plan with no opt-out provision for those who object, defendants have established an unconstitutional condition for attaining a publicly provided education. While education is not a fundamental right under the federal constitution, *see San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), provision of education ranks at the very apex of the state's function. *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("education . . . is the very foundation of good citizenship. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms"). The Bethlehem Area School District, with the sanction of the appeals court, has conditioned receipt of public education on surrendering of the petitioners' constitutional right to be free from involuntary servitude. In so doing, the school district has deprived petitioners of the benefit of free, public education that otherwise would be available solely because these students and parents choose to exercise their Thirteenth Amendment rights to be free of servitude to the community against their will.

This Court has held that a public agency "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . " *Perry v. Sindermann*, 408 U.S. 564, 597 (1972); *see also Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). The appeals

court allows for the denial of one of the most fundamental governmental benefits – the provision of publicly financed education to all children – because of petitioners' refusal to submit to involuntary community service.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS PROHIBITING COERCED AFFIRMANCE OF BELIEF UNDER THE FIRST AMENDMENT

Embodied in the First Amendment's protection for freedom of speech is the right to refrain from speaking or engaging in expressive conduct. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977) ("The right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind.' "). As this Court stated in *Barnette*, 319 U.S. at 642 (emphasis added),

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word *or act* their faith therein.

The political orthodoxy prescribed by the mandatory community service program at issue was manifest in the pronouncements of the school directors when enacting the plan. The school directors thought that community service was too important to be left to voluntary efforts to help others in an age of "material consumption, self-indulgence and narcissism" (App. 60). Stressing the

necessity of community service to cure supposed selfishness and materialism infecting children is a profoundly political statement. Of course, the Bethlehem school district is free to teach the value of community service even against the objections of students and parents. Likewise, the West Virginia school board in *Barnette* could teach the value and importance of patriotism and good citizenship to young children. What governmental bodies may not constitutionally require, however, is that students affirm or act in accordance with the particular philosophy chosen by the school directors. Whether through forced flag salutes in *Barnette* or forced community service in the instant case, school directors are prescribing a political orthodoxy and compelling students to submit to that philosophy.

Indeed, the facts of *Barnette* are remarkably similar to those of the instant case. In *Barnette*, the school board wished to instill feelings of patriotism and "national unity" at a time when the country was in the midst of a world war by requiring all students to pledge allegiance to the national symbol of unity, the American flag. According to the West Virginia school board, the values of patriotism and unity were too important to be left to the voluntary choices of individual students. In the instant case, the school district claims that the value of community service is too important to be left to elective courses or for individual students to choose whether to participate, but must be imposed on all students in an age of rampant selfishness and materialism. (App. 60.) The appeals court would not allow students who believe that service to others should be a voluntary choice to exercise the same rights afforded to students who believe that

patriotism and saluting a national symbol should likewise be voluntary and left up to the conscience of the individual.

The appeals court attempted to distinguish the clear import of *Barnette* and *Wooley* by declaring that mandatory community service lacks the necessary expressive component to rise to the level of a First Amendment violation. *Steirer*, 987 F.2d at 994-97 (App. 9-13). The appeals court acknowledges that mandatory community service would, in some instances, constitute "expressive conduct," but not in the instant case due to the "multitude of service options" available, the lack of evidence that students who disagreed with community service would be penalized if they spoke out against it, and the traditional deference accorded school board decision-making. *Steirer*, 987 F.2d at 996-97 (App. 14). Each of these grounds fundamentally misconstrues both petitioners' underlying objection to the Community Service Program and this Court's precedents involving affirmance of state-imposed values.

The gravamen of the students' and parents' objection to community service as imposed by the Bethlehem Area School District is its coercive and involuntary elements. To petitioners, the essence and value of community service lies in its voluntariness. Petitioners have performed and plan to continue to perform voluntary efforts to help others, but believe that a state authority cannot force participation in a program that the state perceives to be in the community's interest. For these parents and students, no variety of service options can trump the fact that the

school district is compelling actual participation in a program that they fundamentally believe should be left to voluntary efforts.*

The appeals court discounts the forced affirmance of the value of community service dictated under the Bethlehem program by pointing to the lack of evidence in the record that students who objected to the plan would be penalized for doing so. *Steirer*, 987 F.2d at 997 (App. 18-19). Although students could conceivably voice opposition to the plan in written evaluation forms, this option does not overcome the constitutional violation at issue. As noted by the dissent in *Wooley*, 430 U.S. at 722, Jehovah's Witnesses who objected to the motto "Live Free or Die" on their license plates could place public disclaimers on their plates without facing penalty. The majority in *Wooley* ruled that despite the option of publicly opposing the state's motto, forced devotion of property to a display one finds repugnant to his ideals constituted a First Amendment violation. Likewise, forced devotion of one's labor to the ideal of community service in contravention of the values of the petitioners constitutes a violation of the First Amendment.

The appeals court also emphasizes the deference afforded school authorities in devising curriculum and

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* Despite the appeals court's claim that students may choose from myriad service options, students' choices are limited to organizations that (1) demonstrate their intention to "promote the welfare of the community"; (2) do not "discriminate against any race, religion, or sex"; and (3) provide assurances that the organization is "free from doctrinal motivation." *Steirer*, 987 F.2d at 991 (App. 5).

determining the content of their programs. *See Edwards v. Aguilard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Programs and decisions, however, that "sharply implicate constitutional values" are subject to review. *Epperson, id.* at 104; *see also Barnette*, 319 U.S. at 637 ("That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source. . . . "). As in the context of the Thirteenth Amendment, the school district is conditioning the receipt of a publicly provided education on the surrender of the First Amendment right to be free of coerced affirmation of belief. Petitioners do not dispute the discretion of the school board to teach the importance of community service or even to offer programs inculcating the value of serving others. Petitioners only seek the narrow relief of opting out of a program that violates their deeply held belief that community service should be voluntary. Conditioning a diploma on mandatory community service is a constitutionally impermissible means to advance the otherwise legitimate state interest in teaching the value of community service.

The State in *Wooley* pointed to its interest in ensuring that citizens gain an understanding of the history and value of individualism. *Id.* at 716. The school district in the instant case points to the state interest in students learning altruism and promoting the community interest. Of course, both the State of New Hampshire and the Bethlehem School District are free to teach these respective values to their citizens. What neither entity may constitutionally do, however, is require that individuals

who object to such creeds actively affirm their support for them either through the use of their property or their labor.

CONCLUSION

The proliferation of mandatory community service programs has significant and troublesome constitutional implications for freedom of speech and freedom from involuntary servitude. We therefore urge this Court to grant the writ of certiorari and establish appropriate constitutional parameters.

Respectfully submitted,

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Dated: June 14, 1993

Lynn Ann STEIRER, a Minor, by Barbara and Thomas STEIRER, as Guardians and in Their Own Right; David Stephen Moralis, a Minor, by Thomas and Barbara Moralis, as Guardians, and in Their Own Right

v.

BETHLEHEM AREA SCHOOL DISTRICT; Thomas J. Dolusio; Ellen Pagano; Barbara Huth; Joseph McCarthy; John Spirk, Sr.; Ruth Prosser; Uriel Trujillo; Lawrence Kisslinger; Lynn Glancy; Robert Thompson.

Barbara and Thomas Steirer, as Parents and Guardians of Lynn Ann Steirer, a Minor, and Thomas and Barbara Moralis, as Parents and Guardians of David Stephen Moralis, a Minor, Appellants.

No. 92-1359.

United States Court of Appeals,
Third Circuit.

Argued Nov. 3, 1992.

Decided March 15, 1993.

Students and parents brought action against school district challenging constitutionality of graduation requirement of community service. Defendants moved for summary judgment. The United States District Court for the Eastern District of Pennsylvania, Daniel H. Huyett, 3rd, J., 789 F.Supp. 1337, granted the motion for summary judgment, and students and parents appealed. The Court of Appeals, Sloviter, Chief Judge, held: (1) district's mandatory requirement that students engage in community service to be entitled to graduate from high

school does not compel expression protected by First Amendment, and (2) mandatory community service program did not constitute involuntary servitude prohibited by the Thirteenth Amendment.

Affirmed.

Robert J. Magee, Eric R. Strauss (argued), Worth Law Offices, Allentown, PA, for appellants.

Michael I. Levin (argued), Cleckner & Fearen, Willow Grove, PA, for appellees.

Thomas A. Bowden, Blum, Yumkas, Mailman, Gutman & Denick, P.A., Baltimore, MD, for amicus-appellants Ass'n for Objective Law.

Richard McMillan, Jr., Barry E. Cohen, William D. Wallace, Stuart Woolman, Crowell & Moring, Washington, DC (Elliot Mincberg, Deanna Duby, People For the American Way, Washington, DC, of counsel), for amicus-appellees, Nat. School Boards Ass'n; Pennsylvania School Boards Ass'n; Com. of Pennsylvania, People For the American Way, Youth Service America, Nat. Service Secretariat, Maryland Student Service Alliance; Nat. Women's Law Center, Carnegie Foundation, Bloomfield Hills School Dist., American Alliance of Rights and Responsibilities.

A. David Baumhart, III, Hill Lewis, Birmingham, MI, for amicus-appellee Bloomfield Hills School Dist.

McCarter & English, Newark, NJ, for amicus-appellee Carnegie Foundation for Advancement of Teaching.

Before: SLOVITER, Chief Judge, STAPLETON and LAY, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Chief Judge.

May a public high school constitutionally require its students to complete sixty hours of community service before graduation? On this issue of first impression for an appellate court, plaintiffs, two high school students and their parents, argue that the mandatory community service program compels expression in violation of the First and Fourteenth Amendments and constitutes involuntary servitude in violation of the Thirteenth Amendment. The district court rejected both challenges. We have jurisdiction under 28 U.S.C. § 1291 (1988).

I.

FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. On April 30, 1990, the Bethlehem Area School District, by a majority vote of its Board of Directors, adopted a graduation requirement that every public high school student, except those in special education classes, complete a total of sixty hours of community service during the student's four years of high school. These hours may be completed after school hours, on weekends, or during the summer. Students must complete the requirement through participation in a

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* Honorable Donald P. Lay, Senior Judge for the Eighth Circuit sitting by designation.

course entitled the "Community Service Program" (the Program), which requires them to "perform sixty (60) hours of unpaid service to organizations or experiential situations approved by the Bethlehem Area School District." App. at 182.

The stated goal of the Program is to "help students acquire life skills and learn about the significance of rendering services to their communities . . . [and] gain a sense of worth and pride as they understand and appreciate the functions of community organizations." App. at 182. The four objectives of the Program are described in the Curriculum Course Guide as:

1. Students will understand their responsibilities as citizens in dealing with community issues.

2. Students will know that their concern about people and events in the community can have positive effects.

3. Students will develop pride in assisting others.

4. Students will provide services to the community without receiving pay.

App. at 193.

The Program is jointly administered by the high school principal, the district coordinator, and the school counselor. In addition, parents are "fully informed" of the Program and are expected to encourage their children to successfully complete the sixty hours of service, to encourage them to continue performing community service after completing the course requirements, to assist in

identifying appropriate organizations or experiential situations, and to provide transportation to the placement site. App. at 186.

The Program maintains an extensive list of more than seventy approved community service organizations including, *inter alia*, AIDS Outreach, Bethlehem Special Olympics, Cedarbrook Nursing Home, Easton Area YWCA, Great Valley Girl Scout Council, Inc., Interfaith Peace Resource Center, Kemerer Museum, Lehigh County Meals on Wheels, Muscular Dystrophy Association, Planned Parenthood of North East Pennsylvania, The Experiment in International Living, Touchstone Theatre, and Wildlands Conservancy. App. at 191. The list of potential community service organizations is open-ended; students and parents are encouraged to submit the names of other potential organizations to the district coordinator for screening and approval. App. at 186, 191. Any organization that (i) "demonstrate[s] [its] intention to promote the welfare of the community"; (ii) does not "discriminate against any race, religion or sex"; and (iii) "provide[s] assurances that the[] organization is free from doctrinal motivation" can participate in the Program. App. at 191.

As an alternative to providing service to an approved community service organization, a student may choose to participate in an "experiential situation." App. at 192. This option allows a student to "develop [his or her] own individual community service experience." *Id.* This alternative experience requires parental approval, the recommendation of the school counselor, and verification by a responsible adult. *Id.* It may involve the arts, community special events, aid to the elderly, the handicapped or the

homeless, emergency services, the environment, library/historical research, recreation activities, or tutoring. *Id.*

After completing the sixty hours of community service, the student must complete a written Experience Summary Form describing and evaluating his or her community service activity.[1] Once the school counselor (i) certifies that the sixty hours of service were completed; and (ii) reviews and approves the student's Experience Summary Form, the student receives half a unit of course credit and a grade of Satisfactory (S).[2] A student who does not satisfactorily complete the Program will not receive a high school diploma.

Barbara and Thomas Steirer and Thomas and Barbara Moralis, individually and as parents and guardians of Lynn Ann Steirer and David Stephen Moralis, respectively, and their two children brought suit in federal district court challenging the constitutionality of the Program and seeking a permanent injunction against its

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[1] The Experience Summary Form asks the student the following questions about each community service activity participated in:

1. Where did you complete this service? How many hours did you serve?
2. What were your duties?
3. What did you gain from this experience?
4. What did you contribute?

App. at 187.

[2] It was initially contemplated that the Program would contain a classroom component on decision making, problem solving, and stress management, but this component was not part of the Program as ultimately adopted.

enforcement. Although both minor plaintiffs have performed and intend to continue performing volunteer work on their own time, they object to being forced to engage in community service as a graduation requirement. The named defendants include the Bethlehem Area School District; Thomas J. Dolusio, in his official capacity as Superintendent of the Bethlehem Area School District; and the nine members of the Board of Directors of the Bethlehem Area School District in their official capacities.

The parties filed cross-motions for summary judgment, agreeing that there were no genuine issues as to any material facts. On March 30, 1992, the district court granted defendants' motion and denied plaintiffs' motion. *See Steirer v. Bethlehem Area School Dist.*, 789 F.Supp. 1337 (E.D.Pa. 1992). Plaintiffs appealed.[3]

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[3] An amicus brief in support of plaintiffs was filed by the Association for Objective Law, "a national organization of lawyers and law students and others formed . . . [with the] purpose [of] advanc[ing] Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system." Amicus Brief for the Association for Objective Law at 1 n. 1. Amici briefs in support of defendants were filed by (i) The Bloomfield Hills School District, a school district in Michigan with a similar mandatory community service program; and (ii) The Carnegie Foundation for the Advancement of Teaching, a public policy center devoted to the improvement of education in the United States; and (iii) The People for the American Way, joined by several other organizations.

II.

DISCUSSION

The Bethlehem Area's mandatory community service program is not unique,[4] but we are aware of no federal appellate court decision addressing the constitutionality of such programs in public schools.[5] We exercise plenary review over a district court's grant of summary judgment. *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128, 129 (3d Cir.1991). We turn to plaintiffs' challenges to the mandatory nature of the Program.

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[4] *See, e.g.*, Marc Fisher, *Serving the Community; A Developing Curriculum Requirement*, Wash. Post, Apr. 10, 1988, at R6 (270-hour community service requirement over four years for Banneker High in Washington, D.C.); Roxana Kopetman, *Unusual Graduation Requirement; 100 Seniors Set for Community Service Project*, L.A. Times, Dec. 22, 1988, at 13 (Long Beach Unified School District high school students must dedicate three school days to community service); Lisa Leff, *Maryland Mandates Public Service By Students*, Wash. Post, July 30, 1992, at A1 (75-hour community service requirement for high school graduation adopted in Maryland); *Students on Compulsory Community Service*, Wash. Post, Sept. 5, 1991, at A20 (Georgetown Day High School students have 60-hour community service graduation requirement); Priscilla Van Tassel, *Students Do Community Work In School Hours*, N.Y. Times, Feb. 16, 1992, § 12NJ, at 1 (state senator has sponsored bill to impose community service graduation requirement; currently students at Princeton High School can choose between community service and career exploration one day a week for one semester).

[5] Similar, although not identical, issues are raised by mandatory pro bono requirements at state law schools or for the bar. *See* John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 Hofstra L.Rev. 1229, 1245 (1991); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 Md.L.Rev. 18, 65, 70 (1990).

A.

First Amendment

The district court granted summary judgment for defendants on plaintiffs' First Amendment claim on the ground that the community service required by the school district is non-expressive conduct. Plaintiffs contend on appeal that performing mandatory community service is expressive conduct because it forces them to declare a belief in the value of altruism. Proceeding on this premise, plaintiffs argue that heightened scrutiny should be applied and that the school board's reasons for making the program mandatory are not sufficiently compelling to outweigh the infringement of the students' First Amendment right to refrain from expressing such a belief.

The freedom of speech protected by the First Amendment,[6] though not absolute, "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977). As the Supreme Court has written:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

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[6] The First Amendment, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943); *see also Wooley*, 430 U.S. at 713, 97 S.Ct. at 1434-35 (unconstitutional to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property [automobile license plate] in a manner and for the express purpose that it be observed and read by the public").

To support their position that the required community service is expressive of the school district's ideological viewpoint favoring altruism, plaintiffs point to statements made by individual members of the school board expressing a favorable view of altruism.[7] Plaintiffs argue that the ideology of altruism is a matter of opinion not shared by all, and that "when a student goes out and works for others in his community, it is natural for an observer to assume that the student supports the idea that helping others and serving the community are desirable." Brief of Appellants at 28. Thus, plaintiffs conclude, a student who participates in the community service program is being forced to engage in expressive conduct.

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[7] *See, e.g.*, App. at 261 ("every individual has a responsibility to other human beings") (statement of defendant Kisslinger); App. at 257 ("as citizens of a democracy [students] have the responsibility to contribute something of their talent toward the welfare of the whole, to return to the community part of all that they have been given by the community") (statement of defendant Thompson); App. at 200 (in testimony defendant Prosser agreed that "human beings have an obligation to provide community service or assistance to other[s]" and that they "should go out of their way to make time to participate in community service").

We may assume *arguendo* that the members of the school board who approved the mandatory community service program believed that there was a value in community service, and that this belief may be equated with what plaintiffs choose to call the philosophy of altruism. It does not follow that requiring students to engage in a limited period of community service as an experiential program that is part of the school curriculum is constitutionally invalid. The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment.

The Supreme Court has noted that "[s]tates and local school boards are generally afforded considerable discretion in operating public schools," *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987), and it has discouraged judicial intervention in the day-to-day operation of public schools. As the Court stated:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which *do not directly and sharply implicate constitutional values.*

Epperson v. Arkansas, 393 U.S. 97, 104 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) (emphasis added) (Arkansas statute prohibiting teaching of a particular doctrine of evolution violates First Amendment). The mere fact that the course

content itself reflects a particular ideology does not necessarily trench upon First Amendment proscriptions.

On the other hand, we do not accept the suggestion made by defendants at oral argument that once the educational purpose of the Program is established, the Program is *ipso facto* constitutional. Even "teaching values" must conform to constitutional standards. The constitutional line is crossed when, instead of merely teaching, the educators demand that students express agreement with the educators' values. The Supreme Court explained in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), that

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect, just as they themselves must respect their obligation to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. *They may not be confined to the expression of those sentiments that are officially approved.*

Id. at 511, 89 S.Ct. at 739 (emphasis added).

The Court applied this principle in *Barnette*, where it held that requiring students in public school to salute the flag and recite the Pledge of Allegiance, with punishment of expulsion and possible delinquency proceedings for those who refused, was unconstitutional. The Court noted initially that the protection granted by the First

Amendment is not limited to verbal utterances but extends as well to expressive conduct. Thus, because the Court viewed saluting the flag in connection with the recital of the Pledge of Allegiance as a "form of utterance," it held that the required salute as well as the recitation was a "compulsion . . . to declare a belief" that violated the students' freedom of speech. 319 U.S. at 631, 63 S.Ct. at 1181, 1182. It explained:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.

Id. at 632, 63 S.Ct. at 1182. In concluding that a compulsory flag salute and pledge "requires affirmation of a belief and an attitude of mind," *id.* at 633, 63 S.Ct. at 1183, the Court stated:

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Id. at 642, 63 S.Ct. at 1187; *see also Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir.1978) (per curiam) (requirement that students stand during the Pledge of Allegiance violates the First Amendment).

Thus, the question presented by this appeal is whether the performance of community service as a required school program carries with it the same "affirmation of a belief and an attitude of mind" that is a

prerequisite for First Amendment protection. *Barnette*, 319 U.S. at 633, 63 S.Ct. at 1183. Unlike the act of community service, the activity involved in cases holding compelled conduct to be violative of the First Amendment included an obviously expressive element. *See, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 795-801, 108 S.Ct. 2667, 2676-80, 101 L.Ed.2d 669 (1988) (requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions collected in the past twelve months that were actually turned over to charity); *Wooley*, 430 U.S. at 713-15, 97 S.Ct. at 1434-35 (requiring Jehovah's Witnesses to display state motto "Live Free or Die" on automobile license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58, 94 S.Ct. 2831, 2838-39, 41 L.Ed.2d 730 (1974) (requiring newspaper to give equal reply space to a political candidate criticized in an editorial). Similarly, a state-required contribution by public school teachers to a labor union's activities was deemed expressive conduct, but only to the extent those union activities involved the expression of political views, the support of political candidates or the advancement of other ideological causes. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36, 97 S.Ct. 1782, 1799-1800, 52 L.Ed.2d 261 (1977).

We find additional guidance for resolution of the question before us in the Court's opinion in *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). The issue in that case was whether displaying the American flag with two peace symbols attached to either side of the flag was expressive conduct. In holding that it was, the Court followed the precedent of *Barnette*, explaining that it had "for decades . . . recognized the

communicative connotations of the use of flags." *Spence*, 418 U.S. at 410, 94 S.Ct. at 2730; *see also Texas v. Johnson*, 491 U.S. 397, 405-06, 109 S.Ct. 2533, 2539-40, 105 L.Ed.2d 342 (1989) (burning American flag in political demonstration is expressive conduct).

The Court explained that conduct is protected by the First Amendment only if it is "sufficiently imbued with elements of communication." *Spence*, 418 U.S. at 409, 94 S.Ct. at 2730. Specifically, the actor must have "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it." *Id.* at 410-11, 418 U.S. at 2730. Thus, in deciding whether conduct is expressive, we must look to the nature of the activity in conjunction with the factual context and environment in which it is undertaken.

The significance for First Amendment purposes of the viewer's perception is readily apparent in the holdings of the Court that protected expressive conduct includes wearing a black arm band to protest the Vietnam war, *Tinker*, 393 U.S. at 505-06, 89 S.Ct. at 735-36; burning a draft card to protest the war, *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968); demonstrating on the grounds of a state capitol, *Edwards v. South Carolina*, 372 U.S. 229, 235-36, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963); a civil rights march, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969); leafletting, *Schneider v. Town of Irvington*, 308 U.S. 147, 160-61, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939); and labor picketing, *Thornhill v. Alabama*, 310 U.S. 88, 102-03, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940). *See also Brown v. Louisiana*, 383 U.S. 131, 141-42, 86

S.Ct. 719, 723-24, 15 L.Ed.2d 637 (1966) (plurality opinion) (sit-in by blacks in a "white-only" library to protest segregation).

However, while acknowledging that the First Amendment protects more than "pure" speech, the Supreme Court has also consistently rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *See O'Brien*, 391 U.S. at 376, 88 S.Ct. at 1678. More recently in *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), the Court held that dance-hall patrons coming together to engage in recreational dancing were not engaged in "expressive association" protected by the First Amendment. The Court stated,

> it is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Id. at 25, 109 S.Ct. at 1595.

The boundaries of expressive conduct have been particularly cabined when the conduct is associated with school curricula. For example, we have held that although teachers have a First Amendment right to advocate the use of particular teaching methods outside of the classroom, this right does not "extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (2d Cir.1990)

(no First Amendment right to use "Learnball" in classroom); *see also Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 795 (5th Cir.1989) (teacher's use of a supplemental reading list did not "fall within the rubric of constitutionally protected speech"), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990); *Fowler v. Board of Educ.*, 819 F.2d 657, 662-63 (6th Cir.) (opinion of Milburn, J.) (teacher's conduct in showing a film was not expressive or communicative where she had shown the film on a noninstructional day, left the room while the film was being shown, and made no attempt to explain to the students a message that could be derived from the film), *cert. denied*, 484 U.S. 986, 108 S.Ct. 502, 98 L.Ed.2d 501 (1987).

Moreover, courts have consistently found that hair and dress codes do not infringe students' First Amendment rights in the absence of any showing that student's appearance was intended as the symbolic expression of an idea. *See, e.g., Bishop v. Colaw*, 450 F.2d 1069, 1074 (8th Cir.1971); *see also Karr v. Schmidt*, 460 F.2d 609, 613 (5th Cir.) (expressing doubt "that the wearing of long hair has sufficient communicative content to entitle it to the protection of the First Amendment"), *cert. denied*, 409 U.S. 989, 93 S.Ct. 307, 34 L.Ed.2d 256 (1972); *New Rider v. Board of Educ.*, 480 F.2d 693, 698 (10th Cir.) ("wearing of long hair is not akin to pure speech"), *cert. denied*, 414 U.S. 1097, 94 S.Ct. 733, 38 L.Ed.2d 556 (1973); *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 842-44 (2d Cir.1977) (public school teachers' dress code does not First Amendment).

Nonetheless, we do not discount entirely the possibility that a school-imposed requirement of community

service could, in some contexts, implicate First Amendment considerations. Arguably, a student who was required to provide community service to an organization whose message conflicted with the student's contrary view could make that claim. Plaintiffs in this case do not make that argument, and the record is to the contrary. The Program does not limit students to providing service to a particular type of community service organization. Students have a multitude of service options which allows them to provide services to organizations with a wide-range of political, religious, and moral views. Activities range from playing in a band to walking a dog for the SPCA. *See Steirer,* 789 F.Supp. at 1340. The list of approved organizations is extensive and open to additions. Furthermore, students are free to design their own experiential situations.

Thus, plaintiffs do not contend that the students are obliged to adopt an organization's objectionable philosophy. Instead they limit their First Amendment challenge to the argument that students must "affirm the philosophy that serving others and helping the community are what life is all about." Brief of Appellants at 25.

There is no basis in the record to support the argument that the students who participate in the program are obliged to express their belief, either orally or in writing, in the value of community service. Thus, they are not "confined to the expression of those sentiments that are officially approved." *Tinker,* 393 U.S. at 511, 89 S.Ct. at 739. To the contrary, as plaintiff Thomas Moralis admitted in his deposition, there is no indication that student who criticized the Program would not receive a passing

grade.[8] Nothing in the record contradicts Moralis' understanding that the students who participate in the Program need not express their agreement with its objectives in order to receiving a passing grade.[9]

Finally, plaintiffs have produced no evidence that people in the community who see these students performing community service are likely to perceive their actions as an intended expression of a particularized message of their belief in the value of community service and altruism. We cannot accept plaintiffs' *ipse dixit*. It is just as likely that students performing community service under the auspices of a highly publicized required school program will be viewed merely as students completing their high school graduation requirements.

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[8] In his deposition, plaintiff Thomas Moralis answered the following questions:

> Q. And isn't it true that students will not be asked to adopt or express any particular ideals or beliefs in order to pass?
> A. That is as stated in the curriculum guide.
> Q. And a child does not have to agree with the program in order to pass it, does he?
> A. As far as I know, no.
> Q. And a child does not have to believe in the objectives of the program in order to pass it, does he?
> A. As far as I know, again, at this point, no.
> Q. And a child does not have to say he agrees with the program in order to pass it, does he?
> A. No.

App. at 171.

[9] Plaintiffs do not make the argument made by amicus The Association for Objective Law that to pass the Program the student must actually declare a belief in the value of altruistic service.

Because we conclude that the act of performing community service in the context of the Bethlehem Area School District high school graduation requirement is not an expressive act that "directly and sharply implicate[s] constitutional values," *Epperson*, 393 U.S. at 104, 89 S.Ct. at 270, we think that it is not our role to say that a school system cannot seek to expose its students to community service by requiring them to perform it. To the extent that there is an implicit value judgment underlying the program it is not materially different from that underlying programs that seek to discourage drug use and premature sexual activity, encourage knowledge of civics and abiding in the rule of law, and even encourage exercise and good eating habits. Schools have traditionally undertaken to point students toward values generally shared by the community. In fact, the Supreme Court has stated that public schools have a long history and tradition of teaching values to their students, including those associated with community responsibility. Public schools are important "in the preparation of individuals for participation as citizens, [] in the preservation of the values on which our society rests" and for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S.Ct. 1589, 1595, 60 L.Ed.2d 49 (1979) (upholding a citizenship requirement for public school teachers); *see also Brown v. Board of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) (education is "the very foundation of good citizenship").

Having decided that the Program does not compel expression protected by the First Amendment, it is necessary to consider whether the state has a compelling interest in implementing a mandatory community service graduation requirement. Accordingly, we find that the district court properly granted summary judgment for defendants on plaintiffs' claim that the mandatory community service program violates the First and Fourteenth Amendments.

B.

Thirteenth Amendment

Plaintiffs' second contention is that a mandatory community service program in a public high school constitutes "involuntary servitude" in violation of the Thirteenth Amendment.[10]

The Supreme Court has explained the coverage of "involuntary servitude" as follows:

> The primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which

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[10] The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . . . " U.S. Const. amend. XIII.

> in practical operation would tend to produce like undesirable results."

United States v. Kozminski, 487 U.S. 931, 942, 108 S.Ct. 2751, 2759, 101 L.Ed.2d 788 (1988) (quoting *Butler v. Perry*, 240 U.S. 328, 332, 36 S.Ct. 258, 259, 60 L.Ed. 672 (1916)). As the Supreme Court has acknowledged, it is easier to comprehend the "general spirit" of the phrase "involuntary servitude" than it is to define the exact range of conditions it prohibits. *Id.* at 942, 108 S.Ct. at 2759.

Plaintiffs argue (i) that the program is servitude because the students provide unpaid service the community for the benefit of others; and (ii) that participation in the program is involuntary because the threat of not receiving a diploma is *prima facie* coercion. Under the guidance of *Kozminiski*, we believe that it is a mistake to dissect the phrase "involuntary servitude" into two components: instead it is more appropriate to consider whether, taking as a whole the set of conditions existing in the imposition of a mandatory community service program in a public high school, the students providing the services are in a condition of involuntary servitude.

In granting summary judgment, the district court placed considerable reliance on *Bobilin v. Board of Educ.*, 403 F.Supp. 1095 (D.Haw.1975), where the court considered whether a state regulation requiring children in public schools to perform cafeteria duty violated the Thirteenth Amendment. The *Bobilin* court concluded that the mandatory cafeteria duty was not involuntary servitude because "the public, and not private, interest and benefit are being served." *Id.* at 1104 (footnotes omitted). Unlike the district court, we do not regard the reasoning

of *Bobilin* as "persuasive," *Steirer*, 789 F.Supp. at 1345, because we are unprepared, at least at this time, to accept the proposition that the Thirteenth Amendment is inapplicable merely because the mandatory service requirement provides a public benefit by saving taxpayers money. We leave that issue for another day. Instead we proceed using a different analysis.

The prohibition against involuntary servitude has always barred forced labor through physical coercion. *See Kozminiski*, 487 U.S. at 934, 942, 953, 108 S.Ct. at 2755, 2759, 2765 (upholding a criminal conviction under 18 U.S.C. § 1584 (1988)[11] of three farm operators who used physical coercion, among other things, to keep two mentally retarded men laboring on their dairy farm for no pay). In addition, it may bar forced labor through legal coercion. For example, in *Clyatt v. United States*, 197 U.S. 207, 215, 218, 25 S.Ct. 429, 431, 49 L.Ed. 726 (1905), the Supreme Court held that peonage, a condition whereby a servant is forced by the threat of legal sanction to work off a debt to a master, constitutes involuntary servitude. Similarly, in *United States v. Reynolds*, 235 U.S. 133, 146, 150, 35 S.Ct. 86, 89, 90, 59 L.Ed. 162 (1914), the Court found involuntary servitude in a criminal surety system whereby a misdemeanant contracted to work for a surety in exchange for the surety's payment of the fine, subject to criminal penalties should the misdemeanant fail to

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[11] Under this section, anyone who "knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1584 (1988).

fulfill the labor contract. In *Pollock v. Williams*, 322 U.S. 4, 5, 25, 64 S.Ct. 792, 793, 802, 88 L.Ed. 1095 (1944), the Court held that subjecting debtors to prosecution and criminal punishment for failing to perform services for which money had been received in advance violates the prohibition against involuntary servitude. As the Supreme Court has pointed out, the critical factor in every case finding involuntary servitude is that the victim's only choice is between performing the labor on the one hand and physical and/or legal sanctions on the other. *See Kozminiski*, 487 U.S. at 943, 108 S.Ct. at 2760.

Significantly, not even every situation in which an individual faces a choice between labor or legal sanction constitutes involuntary servitude. Governments may require individuals to perform certain well-established "civic duties", such as military service and jury duty, and impose legal sanctions for the failure to perform. *See Butler*, 240 U.S. at 333, 36 S.Ct. at 259. In *Butler* itself, the Court held that a Florida law requiring every able-bodied male within a certain age range to "work on the roads and bridges of the several counties for six days of not less than ten hours each in a year when summoned," *id.* at 329, 36 S.Ct. at 258 (quotation omitted), did not amount to involuntary servitude because a compulsory labor requirement, just like jury duty or military service, was a well-established duty owned by individuals to the state. *Id.* at 33, 36 S.Ct at 259; *see also Selective Draft Law Cases*, 245 U.S. 366, 390, 38 S.Ct. 159, 165, 62 LEd. 349 (1918) (holding that draft does not violate Thirteenth Amendment was never intended to interfere with the state's power to compel its citizens to fulfill such duties. *Butler*, 240 U.S. at 333, 36 S.Ct. at 259; *see also Heart of Atlanta*

Motel, Inc. v. United States, 379 U.S. 241, 261, 85 S.Ct. 348, 359, 13 L.Ed.2d 258 (1964) (holding that provision of Civil Rights Act of 1964 prohibiting discrimination in public accommodations did not violate the Thirteenth Amendment because it merely codified common-law innkeeper rule that predated the Thirteenth Amendment, and because the requirements of the Act were not in any way "akin to African slavery" (quoting *Butler*, 240 U.S. at 332, 36 S.Ct. at 259)).

Modern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement. *See, e.g., United States v. King*, 840 F.2d 1276, 1280 (6th Cir.) (members of the House of Judah, a religious sect, violated 18 U.S.C. § 1584 where they "repeatedly used and threatened to use physical force to make the children [at their camp] perform labor and the children believed they had no viable alternative but to perform such labor"), *cert. denied*, 488 U.S. 894, 109 S.Ct. 234, 102 L.Ed.2d 224 (1988); *United States v. Booker*, 655 F.2d 562, 563, 566 (4th Cir.1981) (owners of migrant labor camp held farm workers in involuntary servitude in violation of 18 U.S.C. § 1584 where they forbade them from leaving without paying their debts and enforced the rule by threats of physical harm, actual physical injury, and kidnapping workers who attempted to leave and returning them to the farm); *Jobson v. Henne*, 355 F.2d 129, 131-32 (2d Cir.1966) (patients in mental institution performing required labor stated claim for violation of Thirteenth Amendment); *Downs v. Department of Public Welfare*, 368 F.Supp. 454, 465 (E.D.Pa.1973) (same); *Santiago v. City of Philadelphia*, 435 F.Supp. 136, 156-57 (E.D.Pa.1977) (refusing to dismiss Thirteenth Amendment

claim filed by juveniles detained and forced to work at a youth service center).

Outside of these contexts, courts have consistently rejected claims that "forced labor" amounted to involuntary servitude. For example, it is not involuntary servitude when the state requires attorneys to provide a fixed number of hours of legal representation without compensation as a condition of practicing law. *See United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir.1986). Similarly, it is not involuntary servitude for the government to collect liquidated damages from a participant in the National Health Service Corps scholarship program who, after accepting the scholarship money and completing his medical degree, declined to perform the required services. *See United States v. Redovan*, 656 F.Supp. 121, 128-29 (E.D.Pa.1986), *aff'd without op.*, 826 F.2d 1057 (3d Cir.1987). Finally, it is not involuntary servitude to offer prisoners an option of participating in a work-release program, even though the consequence of not working and remaining in jail may be "painful." *Watson v. Graves*, 909 F.2d 1549, 1552-53 (5th Cir.1990).

In each of these situations courts found no compulsion because the individuals had alternatives to performing the labor; a lawyer can choose not to practice law to avoid the mandatory service requirement; a doctor can refuse to provide the contracted-for services and instead pay the damages for breach of the contract; and a prisoner can choose to stay in jail rather than enter the work-release program. The fact that these choices may not be appealing does not make the required labor involuntary servitude. *See also Booker*, 655 F.2d at 566-67 (not involuntary servitude if "the servant knows he has a choice

between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad" (quoting *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir.1964)).

Thus, we follow the Supreme Court and other courts of appeals in taking a contextual approach to involuntary servitude by confining the Thirteenth Amendment to those situations that are truly "akin to African slavery." The court in *Booker* analogized the farm workers at the migrant labor camp to slaves because both "were persons without property and without skills save those in tending the fields. With little education, little money and little hope, they easily fell prey to the tempting offers of powerful and unscrupulous individuals, who would soon assert complete control over their lives." 655 F.2d at 566 (citation and quotation omitted).

There is no basis in fact or logic which would support analogizing a mandatory community service program in a public high school to slavery. The record amply supports the defendants' claim that the community service program is primarily designed for the students' own benefit and education, notwithstanding some incidental benefit to the recipients of the services. An educational requirement does not become involuntary servitude merely because one of the stated objectives of the Program is that the students will work "without receiving pay." App. at 268.

Accordingly, we hold that the mandatory community service program instituted in the Bethlehem Area School District as a high school graduation requirement does not

constitute involuntary servitude prohibited by the Thirteenth Amendment.

III.

CONCLUSION

For the foregoing reasons, we will affirm the district court's grant of summary judgment for defendants on plaintiffs' claims under the First and Thirteenth Amendments.

Barbara STEIRER and Thomas Steirer, individually and as parents and guardians of Lynn Ann Steirer, a minor, and Thomas Moralis and Barbara Moralis, individually and as parents and guardians of David Stephen Moralis, a minor, Plaintiffs,

v.

The BETHLEHEM AREA SCHOOL DISTRICT, Defendants.

Civ. A. No. 90-6046.

United States District Court,
E.D. Pennsylvania.

April 2, 1992.

Students and parents brought action against school district to challenge constitutionally of graduation requirements of community service. Defendants moved for summary judgment. The District Court, Huyett, J., held that: (1) school district's graduation requirement of 60 hours of community service between start of ninth grade and completion of twelfth grade did not violate Thirteenth Amendment's prohibition against involuntary servitude, and (2) community service program did not violate First Amendment.

Motion granted.

Robert J. Magee and Eric R. Strauss, Worth Law Offices, P.C., Allentown, Pa., for plaintiffs Barbara Steirer, Thomas Steirer, Thomas Moralis, Barbara Moralis, Lynn Ann Steirer and David Stephen Moralis.

Andrew E. Faust, Curtin and Heefner, Doylestown, Pa., Michael I. Levin, Cleckner and Fearen, Willow Grove,

Pa., for defendants Bethlehem Area School Dist., Thomas J. Dolusio, Ellen Pagano, Barbara Huth, Joseph McCarthy, John Spirk, Sr., Ruth Proser, Uriel Trujillo, Lawrence Kisslinger, Lynn Glancy, and Robert Thompson.

MEMORANDUM & ORDER

HUYETT, District Judge.

This action as a result of the adoption by the Bethlehem Area School District of a revised program of high school studies which includes a community service graduation requirement. Plaintiffs, Barbara Steirer and Thomas Steirer, individually and as parents and guardians of Lynn Ann Steirer, and Thomas Moralis and Barbara Moralis, individually and as parents and guardians of David Stephen Moralis, bring this action against defendants Bethlehem Area School District, Thomas J. Dolusio, Ellen Pagano, Barbara Huth, Joseph McCarthy, John Spirk, Sr., Ruth Prosser, Uriel Trujillo, Lawrence Kisslinger, Lynn Glancy and Robert Thompson. Plaintiffs claim that the community service program and graduation requirement adopted by the Bethlehem Area School District violates the First, Thirteenth and Fourteenth Amendment rights of the minor plaintiffs and of all students attending Bethlehem Area schools. Both plaintiffs and defendants have filed motions for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons stated below, I shall grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

I. INTRODUCTION.

On April 30, 1990, the Bethlehem Area School District ("school district"), by a majority vote of its Board of Directors, adopted a program of high school studies which includes a community service graduation requirement. The program requires that every student in the school district provide sixty (60) hours of community service between the start of ninth grade and the completion of twelfth grade.[1] The required community service can be provided through an agency approved by the school district, through an independent program selected by the district or through an independent program selected by the student and approved by the appropriate school officials.

The plaintiffs in this action are two sets of parents who reside within the school district and their two children, each of whom attends a public high school operated by the school district. The defendants are the school district, members of the school district's board of directors, and the school district superintendent. The school district is located in Lehigh County and Northampton County and covers approximately forty-two square miles. The school district serves a population of approximately 100,000 and enrollment in all age groups is approximately 12,000. Approximately 3,500 students are enrolled in high schools in the school district.

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[1] The only students excluded from the community service requirement are those students attending special education classes.

Under the program adopted by the Bethlehem Area School District, any community service project must meet the course objectives outlined in the curriculum course guide. The four (4) course objectives identified and outlined in the curriculum course guide are as follows: (1) students will understand their responsibilities as citizens dealing with community issues; (2) students will know that their concern about people and events in the community can have positive effects; (3) students will develop pride in assisting others; and (4) students will provide services to the community without receiving pay.

The school district's superintendent, Thomas Dolusio, states that the purposes of the community service program include the following:

a. To help students acquire life skills;

b. To help students learn about the significance of rendering service to their community;

c. To give students a sense of worth;

d. To give students a sense of pride;

e. To teach students about community organizations;

f. To give students a sense of appreciation of the worth of community organizations;

g. To help students understand their responsibilities as citizens in dealing with community issues;

h. To teach students that their concerns about people and events in the community can have positive effects;

i. To improve students' self-esteem;

j. To improve the students' ego and moral development;

k. To give students the opportunity to explore new roles, identities and interests;

l. To enhance the students'; willingness to take and accept new challenges;

m. To have students assume responsibility and to accept the consequence of their actions;

n. To develop intellectual development and academic learning in such areas as the expression of ideas, reading and record-keeping;

o. To promote higher-level thinking skills such as open-mindedness;

p. To enhance the skills of learning from experience;

q. To have students learn about and be exposed to service-related skills.

See Dolusio Aff. at ¶ 17.

Phyliss Walsh, the community service program director, was directed by the school district to write the curriculum for the program. As originally drafted, the community service program possessed two components. The first component of the draft program contemplated the classroom teaching and training of decision making, problem solving, and stress management skills. The second component of the draft program required the actual service to the community.

The program adopted by the school district only includes the community service component. Certain

aspects of the classroom component of the draft program have, however, been incorporated into the community service component, including the integration of small group meetings into the program. The community service program was not designed to ensure and does not require that a correlation exist between a student's community service experience and that student's classroom coursework.

None of the defendants who voted in favor of adopting the community service program and graduation requirement expressed any dissatisfaction with the program's course objectives and none of the defendants proposed any amendments to the stated objectives of the community service program. All of the defendants who voted for the challenged program believe that community service is an admirable and worthwhile endeavor. Further, all of the defendants believe that all people should participate in community service in one manner or another.

The purpose of the community service program is not to require children to provide clerical or maintenance services to the school district. Rather, as stated in the course objectives, the purpose of the program is to expose students to community service and to make students aware of the positive aspects of providing community service. The defendants decided to make the community service program mandatory because they believed that certain students would benefit from the community service program and would not participate absent a mandatory program.

Pursuant to the community service program's requirements, each student must apply to the school for approval of the particular community service project that the student wishes to pursue. The school district uses separate application forms for students to apply for approval of each project and service. Many and varied volunteer activities will satisfy the community service requirement. For example, marching in the school band during the Halloween parade, playing with children at the Jewish Community Center, stuffing envelopes for the Lehigh Presbytery and walking and grooming dogs and cats for the SPCA all qualify as community service under the Bethlehem Area School District program.

The school system monitors each student's community service project through two required meetings between each student and a designated counselor. At these student meetings, the counselor is required to review each student's community service project. The meetings with the counselors can last for as little time as five (5) minutes. The student counselor meetings represent the only formal involvement of the Bethlehem Area School District in monitoring the progress of the community service program. The two minor plaintiffs, Lynn Ann Steirer and David Stephen Moralis, participated in a community service program meeting with a counselor. Between five and six students attended this meeting which lasted approximately fifteen (15) minutes.

In exchange for providing sixty (60) hours of service to the community without pay, each student receives .5 units of credit toward the school's credit requirement for high school graduation. The community service component of the school's curriculum must be completed as a

condition of graduation from the Bethlehem Area School District. The school district's complete high school graduation requirements are as follows:

	Classes of 1992 & 1993	Classes of 1994 & 1995	
Required Course	Credit	Credit	Grade When Usually Taken
Language Arts	4.0	4.0	1.0 credit per year
World Cultures 9	1.0	1.0	9
World Cultures 10	1.0	1.0	10
U.S. History	1.0	1.0	11
Government	.5	.5	12
Economics	.5	.5	12
Mathematics	3.0	4.0	1.0 credit per year
Science	3.0	4.0	1.0 credit–Grade 9
			1.0 credit–Grade 10
			1.0 credit–Grade 11/12

Required Courses	Classes of 1992 & 1993 Credit	Classes of 1994 & 1995 Credit	Grade When Usually Taken
Physical Education	.8	.8	.2 credit per year
Health 9	.2	.4	9
Health 10	.2	.4	10
Highway Education	.1	.1	11
Computer Technology	.5	.5	9-12
Community Service	n/a	.5	9-12
Arts	1.0	1.0	9-12
General Elective	5.0	6.0	
	21.8	24.7	

Minor plaintiff Lynn Ann Steirer is a student at Liberty High School in the Bethlehem Area School District and is subject to the provisions and requirements of the community service program. During the course of the year, she spends approximately fifty (50) hours teaching crafts to children pursuant to her participation in the Girl Scouts Heritage Patrol. In addition, Lynn Ann Steirer engages in other volunteer activities, including helping with Sunday School class, assisting her mother with certain Girl Scout activities, and assisting in certain basketball and volleyball activities at the local junior high school. Lynn Ann Steirer performed these activities before the school district adopted the community service program. She objects to the community service program because she doesn't believe that the school district has a right to force her to participate.

Minor plaintiff David Moralis is also a student at Liberty High School subject to the community service program requirements. He also has participated in certain volunteer activities and anticipates that he will engage in more volunteer work in the future. David Moralis objects to the community service program because he doesn't believe that the school district has a right to force him to participate.

II. DISCUSSION.

A. *Standard For Summary Judgment.*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An examination of the record reveals that no genuine issue of material fact exists and this case is ripe for resolution.[2] As discussed below, defendants have demonstrated as a matter of law that the community service program and graduation requirement does not violate the First, Thirteenth and Fourteenth Amendments to the United States Constitution. Under Rule 56(c), this Court must accordingly grant defendants' motion for summary judgment. *Celotex Corp. v. Catrett,*

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[2] The parties agree that there is no genuine issue of material fact. *See* Plaintiffs' Motion For Summary Judgment at 2-3; Defendants' Motion For Summary Judgment at 1.

477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 365 (1986).

B. *Plaintiffs' Thirteenth Amendment Claim.*

Plaintiffs claim that the Bethlehem Area School District's Community service program violates the Thirteenth Amendment's prohibition against involuntary servitude. Plaintiffs' claim is novel. The issue of whether mandatory community service constitutes involuntary servitude under the Thirteenth Amendment has not been addressed by any decision that the parties or Court have discovered.[3] Examination of the language, purpose and interpretation of the Thirteenth Amendment, however, makes clear that no Thirteenth Amendment violation has occurred in the instant matter.

The obvious starting point in examining plaintiffs' Thirteenth Amendment claim is the language of the amendment itself. The Thirteenth Amendment states:

> *Section 1.* Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. Amendment XIII.

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[3] The Court notes that other school districts in the United States have adopted similar community service programs. *See* Defendants' Memorandum In Support of Summary Judgment at 4-6.

As the Supreme Court in *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988) (reversing conviction pursuant to 18 U.S.C. §§ 241, 1584 because district court's jury instructions regarding involuntary servitude contemplated means of coercion other than actual or threatened physical or legal coercion), recognized: "[w]hile the general spirit of the phrase "involuntary servitude, is easily comprehended, the exact range of conditions it prohibits is harder to define." *Id.* at 942, 108 S.Ct. at 2759. Accordingly, the Court turns to the purpose and interpretation of the Thirteenth Amendment in examining the reaches and limits of the amendment's prohibition against involuntary servitude.

As the Supreme Court acknowledged in *Kozminski*, the Thirteenth Amendment was adopted with the "general intent to prohibit conditions 'akin to African slavery . . . ' " *Id., quoting Butler v. Perry*, 240 U.S. 328, 332-333, 36 S.Ct. 258, 259, 60 L.Ed. 672 (1916). Further, as *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911) teaches:

> [t]he language of the 13th Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. The words involuntary servitude have a "larger meaning than slavery. It was very well understood that, in the form of apprenticeship

> for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word 'slavery' had been used." *Slaughter House Cases* [83 U.S. (], 16 Wall.[)] 36, 69, 21 L.Ed. 394, 406 (1873). The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

Id. 219 U.S. at 240-41, 31 S.Ct. at 151. In applying the Thirteenth Amendment's prohibitions in a contemporary context, the Court agrees that:

> one must consider the realities of modern life. As recent Federal Circuit Court cases point out, the contours of slavery have shifted since the enactment of the Thirteenth Amendment. *United States v. Warren*, 772 F.2d 827 (11th Cir.1985), *cert. denied*, 475 U.S. 1022 [106 S.Ct. 1214, 89 L.Ed.2d 326] (1986); *United States v. Mussry*, 726 F.2d 1448 (9th Cir.1984), *cert. denied*, 469 U.S. 855 [105 S.Ct. 180, 83 L.Ed.2d 114] (1984); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981). No longer is the slave always black and the master white. And, while subtler forms of coercion have replaced the blatant methods of subjugation practiced in the ante-bellum South, these new practices are no less effective than their older counterparts.

United States v. Lewis, 644 F.Supp. 1391, 1401 (W.D.Mich. 1986) (holding that members of religious sect knowingly and willfully held one boy to involuntary servitude).

As defendants correctly note, however, "[f]orced labor in some special circumstances may be consistent with the general basic system of free labor." *Pollock v. Williams*, 322 U.S. 4, 17, 64 S.Ct. 792, 799, 88 L.Ed. 1095 (1944) (referencing instances where forced labor as a means to punish crime and to build highways was held to be permissible under the Thirteenth Amendment). Further, this Court is mindful of the Supreme Court's direction that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and *not of federal judges*." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988) (emphasis added) (citations omitted). In consideration of the foregoing, I now turn to the question of whether the school district's community service program violates the Thirteenth Amendment.

Plaintiffs argue that a review of cases interpreting the Thirteenth Amendment reveals that there are two elements which are necessary for a court to conclude that involuntary servitude has occurred: "(1) one person providing work or services to another; (2) under some type of compulsion or coercion." *See* Plaintiffs' Memorandum In Support of Summary Judgment at 5-7, *citing United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988); *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873); *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191; *Pollock v. Williams*, 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1944); *United States*

v. Mussry, 726 F.2d 1448 (9th Cir. 1984), *cert. denied* 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984); *United States v. Booker*, 655 F.2d 562 (4th Cir.1981); *United States v. Warren*, 772 F.2d 827 (11th Cir.1985), *cert. denied* 475 U.S. 1022, 106 S.Ct. 1214, 89 L.Ed.2d 326 (1986). Plaintiffs contend that it is obvious that the community service program requires the provision of work or services for another. Further, plaintiffs argue that the community service program employs the compulsion or coercion necessary to fall within the ambit of Thirteenth Amendment proscription.[4]

Defendants respond with four principle arguments. First, defendants distinguish the cases relied upon by plaintiffs by arguing that the purpose of the community service program is not to benefit the recipient of service (i.e. the community), but rather to advance seventeen separate educational goals. Defendants argue that the essence of involuntary servitude is the personal service of one person for the benefit of another. *See Bailey v. Alabama*, 219 U.S. 219, 241, 31 S.Ct. 145, 151, 55 L.Ed. 191 (stating that the Thirteenth Amendment prohibits "that control by which the personal service of one man is disposed of or coerced *for another's benefit, which is the*

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[4] For the reasons stated below, the Court need not directly address the merits of plaintiffs' arguments. Further, the Court notes that the parties strongly contest the import and applicability of *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988) to civil claims of involuntary servitude. As the reaches of *Kozminski* do not impact the Court's conclusion in the instant matter, the Court need not address whether the definition of involuntary servitude used in *Kozminski* applies to civil as well as criminal cases.

essence of involuntary servitude." (emphasis added)). Here, defendants contend that service performed by students is principally for the students' own benefit. Thus, under the *Bailey v. Alabama* definition, defendants contend that the required community service cannot rise to involuntary servitude under the Thirteenth Amendment. Second, defendants contend that plaintiffs rely upon cases where work is compelled by the actual or threatened use of physical or legal coercion. In contrast, defendants correctly note that students refusing to perform community service are not subject to physical force or legal sanction.[5] Third, defendants argue that the cases relied upon by plaintiffs are wholly distinguishable from the instant matter because students possess alternative choices to public school graduation. Defendants correctly contend that in the Thirteenth Amendment violation cases relied upon by plaintiffs, the challenged actions have been accompanied by a complete lack of choice in whether to engage in the challenged work or service. Here, defendants argue that the minor plaintiffs can (1) attend a private school; (2) withdraw from school and pursue education at home; or (3) remain in school and obtain a high school equivalency diploma. Fourth, defendants contend that the community service required is distinguishable by its nature from work found violative of the Thirteenth Amendment. In essence, defendants argue that there is a qualitative difference between tutoring a child or marching in the

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[5] The Court recognizes that students refusing to participate in the community service program are subject to the sanction of not graduating from the school district.

school band and engaging in migrant farm work. *See United States v. Booker,* 655 F.2d 562 (4th Cir.1981).[6]

In addressing plaintiffs' Thirteenth Amendment claim, *Bobilin v. Board of Education, State of Hawaii,* 403 F.Supp. 1095 (D.Hawaii 1975) provides helpful instruction. In *Bobilin,* plaintiff students challenged the validity of regulations promulgated by the Hawaii State Board of

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[6] The Court notes that defendants present several persuasive arguments. Defendants' reliance on the definition of involuntary servitude in *Bailey v. Alabama, see* Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment at 3, provides ground to distinguish the instant case from those decisions concluding that the Thirteenth Amendment has been violated. Further, defendants make a compelling argument that plaintiffs' implicit ability to choose whether to participate in the community service program, removes the program from the Thirteenth Amendment's reaches. *See* Defendants' Memorandum In Support of Summary Judgment at 25-29, *citing International Union v. Wisconsin Employment Relations Board,* 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949) (holding that issuance of injunction by state labor relations authority that orders state employees back to work does not violate Thirteenth Amendment because employees had the right to quit employment); *Cummings v. Virginia School of Cosmetology,* 466 F.Supp. 780 (E.D.Va.1979) (holding that school's use of students as hairdressers for customers did not violate Thirteenth Amendment in light of students' voluntary choice to enroll in the school); *Sellers v. Phillip's Barber Shop,* 46 N.J. 340, 217 A.2d 121 (1966) (court order directing barber to cut hair of blacks did not violate Thirteenth Amendment because barber possessed choice of deciding to no longer practice as a barber) (citations omitted). Because the Court concludes on other grounds that the community service requirement does not violate the Thirteenth Amendment, the Court need not address each reason why plaintiffs' Thirteenth Amendment claim fails.

Education which required children of school age to perform cafeteria duty throughout the State of Hawaii. In a carefully considered opinion, the *Bobilin* court held that plaintiffs' complaint failed to present a substantial federal question under the Thirteenth Amendment and refused to convene a three-judge court pursuant to 28 U.S.C. § 2281.

In reaching this conclusion, *Bobilin* reviewed the cases where courts have concluded that activity violates the Thirteenth Amendment's prohibition against involuntary servitude and those cases where the courts have allowed servitude despite the dictates to the Thirteenth Amendment. *Bobilin* at 1099-1103, *citing Jobson v. Henne,* 355 F.2d 129 (2d Cir.1966) (holding that patients in a mental institution, who alleged that they were required to perform housekeeping duties at the institution for eight hours per night, six nights per week, in addition to working day jobs, stated claim under Thirteenth Amendment and 42 U.S.C. § 1983); *Weidenfeller v. Kidulis,* 380 F.Supp. 445 (E.D.Wis.1974) (holding that requiring mental patients to perform non-therapeutic work could rise to involuntary servitude under Thirteenth Amendment and accordingly denying defendants' motion to dismiss); *Downs v. Department of Public Welfare,* 368 F.Supp. 454 (E.D.Pa.1973) (holding that individual jurisdiction existed over state authorities where complaint alleged forced labor of mental patients); *Hodges v. United States,* 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906) (holding that district court did not possess jurisdiction over defendants' claim seeking to overturn indictment because "it was not the intent of the [Thirteenth] Amendment to denounce every act

done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery . . . " *Id.* at 19, 27 S.Ct. at 9); *Beltran v. Cohen,* 303 F.Supp. 889 (N.D.Cal.1969) (holding that law authorizing summary levy on wages to collect unpaid federal income taxes was not involuntary servitude); *Pollock v. Williams,* 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1944) (declaring null and void Florida statute making it a misdemeanor to induce monetary advances with intent to defraud by a promise to perform labor); *Clyatt v. United States,* 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905) (reversing judgment and remanding for new trial where evidence of prior peonage was excluded in case against employer for returning individuals to a condition of peonage); *Butler v. Perry,* 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 (1916) (upholding law that required able-bodied men between the ages of twenty-one and forty-five to work on roads and bridges of the state for no less than sixty hours annually when summoned to do so and rejecting Thirteenth Amendment challenge); *Selective Draft Law Cases,* 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918) (upholding compulsory military service); *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (upholding compulsory military service); *Heflin v. Sanford,* 142 F.2d 798 (5th Cir.1944) (denying petition for writ of habeas corpus because conviction for failure to report to designated military training camp was constitutional under Thirteenth Amendment). *Bobilin* states and this Court agrees:

> [a]t a minimum, the cases cited above indicate that there are certain servitudes which because of their historical circumstance are excepted from the prohibitions of the Thirteenth Amendment or because of the public need involved are

> considered to be justified "special circumstances" in the public interest.

Id. at 1103.

Further, *Bobilin* persuasively states:

> [d]efendants here argue that cafeteria duty falls within a historical exception – that of education. Plaintiffs allege, however, that no educational value is involved.[7]
>
> Taking plaintiffs' allegation as true, although it is disputed in defendants' answer, this Court nevertheless, is unable to find that cafeteria duty falls within the constraints of the Thirteenth Amendment. Assuming, as both plaintiffs and defendants do, that the cafeteria duty allows the State to reap a financial benefit, that is, the obviation of any necessity to hire, at great expense, professional employees to perform the school-related housekeeping duties in the stead of students, it is clear that both parties must agree that the public, and not private interest and benefit are being served.
>
> *On the basis of the balances that the Supreme Court has struck in the past*[8] *– its weighing the*

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[7] In *Bobilin*, plaintiffs implicitly conceded "that characterizing cafeteria duties as 'education' would undercut their assertion of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution." *Id.* at 1098. Here, the Court notes that there is no issue regarding the fact that the principle purpose of the community service program is educational.

[8] The parties do not rely upon and the Court has not discovered any decision which would change *Bobilin's* conclusion regarding the balances the Supreme Court has adopted in reviewing Thirteenth Amendment claims.

> *duties and impositions mandated by law against the public need served – it is manifest to this Court that the cafeteria duty here imposed by State regulations do not fall within the proscription of the Thirteenth Amendment.*

Id. at 1103-04 (emphasis added)

The Court concludes that the reasoning of *Bobilin* is persuasive. Under the reasoning of *Bobilin*, it is apparent that the community service requirement does not violate the Thirteenth Amendment. Further, in the instant case, there is no dispute that the community service program serves educational purposes.[9] Finally, the Court agrees that the appropriate remedy for plaintiffs' complaint lies with a legislative rather than judicial body. *Id.* at 1105[10]

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[9] The Court notes that the distinctions drawn between therapeutic and non-therapeutic work in *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966), support the conclusion that no Thirteenth Amendment violation is caused by the community service program adopted by the Bethlehem Area School District. The obvious corollary in the public school setting to the therapeutic:non-therapeutic work distinction drawn in *Jobson*, is the distinction between educational and non-educational programs. Here, as opposed to *Bobilin*, there is no issue that the community service program serves educational purposes. Thus, the analysis of *Jobson* further supports the conclusion that no Thirteenth Amendment violation has occurred in the Bethlehem Area School District.

[10] In *Bobilin*, the District of Hawaii instructed plaintiffs that their objection to mandatory cafeteria duty should be directed at the state legislature. Here, plaintiffs are free to resort to local or state legislative bodies in pursuing a change in the community service program. *See Hazelwood School District v. Kullheimer*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).

Accordingly, plaintiffs' Thirteenth Amendment claim will be rejected.

C. *Plaintiffs' First Amendment Claim.*

Plaintiffs also claim that the community service program violates the First Amendment rights of the school district's students. This argument lacks merit. The essence of plaintiffs' First Amendment claim is that the community service program compels the minor plaintiffs to declare through their actions that altruism is a desirable life philosophy. *See* Plaintiffs' Memorandum In Support of Summary Judgment at 20-21. The Supreme Court, however, has made clear that the activity required by the community service program does not fall within the protections of the First Amendment to the United States Constitution.

As *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967) teaches: "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376, 88 S.Ct. at 1678. Further, conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). As the Supreme Court more recently stated:

> [i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street, or meeting one's friends at a shopping mall – but such a

> kernel is not sufficient to bring the activity with the protection of the First Amendment. We think the activity of these dance-hall patrons – coming together to engage in recreational dancing – is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts v. United States Jaycees*, 468 U.S. 609 [104 S.Ct. 3244, 82 L.Ed.2d 462] (1984).

City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989) (holding that ordinance restricting admission to certain dance halls to individuals between fourteen and eighteen years of age did not violate the First and Fourteenth Amendment).

In the Instant matter, plaintiffs' claim represents an attempt to place the kernel of expression implicit in all activity within the protections of the First Amendment. *City of Dallas v. Stanglin* expressly rejects this kind of First Amendment claim. Therefore, it is apparent that plaintiffs' First Amendment argument must be rejected.

In support of their First Amendment claim, plaintiffs rely on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978). This reliance is flawed. *Tinker* involved the expressive conduct of wearing an arm band, while *Barnette* addressed a school's ability to compel an individual to salute the flag and *Lipp v. Morris* reached the issue of whether standing during the pledge of allegiance constituted expressive conduct protected by the

First Amendment. Here, the community service required by the school district is non-expressive.

As the Court noted in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989):

> [i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Id. at 404, 109 S.Ct. at 2539, *quoting Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974).

In this case, there is no intent to convey a particularized message supporting altruism and there is no likelihood that those witnessing the community service will understand the service's purpose to be promoting values of altruism. Simply put, the community service is like any other educational activity sponsored by the school district. The community service program occupies the same position within the school district's curriculum as physical education, science, history, highway education, and other classes.[11]

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[11] The Court notes that if it accepted plaintiffs' First Amendment argument, school districts would be unable to require any education activity without surviving First Amendment scrutiny by the Courts. For example, under the logic of plaintiffs' argument, a student's objection to attending a mandatory school trip to a museum of natural sciences would be clothed in the protections of the First Amendment because

Under the Supreme Court's teaching in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989), *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 2729, 41 L.Ed.2d 842 (1974), and *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967), it is apparent that plaintiffs' First Amendment claim lacks merit. Therefore, plaintiffs' claims under the First and Fourteenth Amendment will be rejected.

III.

CONCLUSION

For the reasons stated above, I shall grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

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attending the trip would *a fortiori* represent an expression of belief that the study of natural sciences is a worthwhile endeavor. It is obvious that this reading of the First Amendment must be flatly rejected. Not only would plaintiffs' interpretation of the First Amendment expand the reaches of the amendment's protection to embrace virtually all activities, the interpretation would also wholly frustrate the Supreme Court's direction that education is the responsibility of teachers, parents, and state and local government, rather than that of the federal courts. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988).

Director Thompson stated, "My comments are a bit lengthy but as I think you know I believe this merits a lot of thought. I tried to give it that thought, and I have listened to everything that has been said. I support the administration's revised requirements for graduation in their entirety, including the mandatory community service proposal. While I know that adjustment and improvements will have to be made, I support the community service proposal for three major reasons. I respect the concerns and questions which have been raised by parents and students and other citizens over the past few weeks and indeed I share many of them myself. Nevertheless, the following factors are for me of overriding importance. First of all, the proposal proclaims that like basic literacy, responsibility to the community which supports and nurtures them is something we expect all young people to understand and practice. We require 12 years of training in basic literacy. By contrast, one half of one course or .5 Carnegie units is not a great deal. It should send a clear message that responsibility to the community is something basic, not something optional like advanced music theory or French IV. What one does after high school graduation is up to the individual. He can give up reading books forever if he chooses as indeed many persons do. He can similarly abandon any sustained or constructive attention to the community in favor of purely private pursuits as do many others. But, the schools will at least have enunciated what I consider responsible educational priorities. The question has been raised during public comment before the board about where the idea of mandatory community service originated. It has antecedents, but the most recent support for

community services come from a series of Carnegie Commission reports, including Earnest Boyer's 1983 study entitled 'High School' in which Boyer advocated 120 hours of community service for graduation. It was the publication of Boyer's report that first made me aware of the idea and its potential value. The second reason I support the administration's proposal is that I believe it will challenge the students who need this kind of experience most but would not be likely to seek or pursue it otherwise. For years, we have turned our backs on many young people, some of them rich, some of them poor, but saying to all of them in effect we really don't expect much of you except that you will be deprived or apathetic or self-centered or depressed or delinquent. Often we see you as merely getting by academically so we don't expect you to make any larger contribution. It is my belief in my professional experience that most apathy and underachievement derive not from low IQ but from low self-esteem. The community service requirement addresses these issues frontally. It says we know you have something to contribute not only to yourself but to others as well and we expect and insist that you will go out and discover what it is. At the same time, the administration's proposal undercuts the bias that says community service is only for a select few, members of moral or social elite who from their personal abundance are capable of giving to others and not just to themselves. My position is that all young people, like all adult citizens, have something to contribute and that the community which nurtures us all needs some portion of the talents of each of us in return. If we elect a voluntary program, we will indeed be preaching to the choir as Dr. Bard from the Department of

Education stated here two weeks ago. The candy stripers will go on serving and the key clubbers will go on serving and perhaps they will be joined by a few others, but I believe that it would be unrealistic to expect a significant voluntary response, 3 percent in Methacton School District and 18 percent in Wissahickon according to Dr. Bard. The strong individualistic side of American culture tells us in many ways that we are basically expected to be private minded and to look after self and family. Anything else that we do is sheer generosity for which we are entitled to feel very, very good about ourselves in addition to acquiring some bonus points to add to our transcript or our resume. Accordingly, there are important limits to what we can expect in the way of a broad based, volunteer energy in our communities. I believe these limits are tightening with each passing year as many of us become more burdened and anxious about our careers and our incomes, more accustomed to television programs at home rather than PTA meetings down at the school. It is my strong conviction after many years of both public service and cultural observation that while preserving the volunteer spirit we need to go beyond it at least in the lesson we teach our young people. I believe we need to teach them that it is not just their privilege to volunteer if they feel so inclined but that as citizens of a democracy they have the responsibility to contribute something of their talent toward the welfare of the whole, to return to the community part of all that they have been given by the community which brings me to my third and final reason for supporting the mandatory community service proposal of the administration. This proposal represents an opportunity to join in making what I believe

may be educational history. We have always taught values of some kind and in some fashion in our public schools even though we are no longer reading the Bible and reciting the Lord's Prayer each morning in the classroom as was done when I was a pupil. Nonetheless, every teacher is imparting values in dozens of subtle ways every day. Of course, the wisest teachers are those who are aware of biases and make them explicit to their students and to their supervisors rather than unconsciously or deliberately attempting to indoctrinate. In the present instance, what I hope to make explicit is that I believe the motivating ideal of our culture is slowly becoming what I call the consumer ideal of human happiness and fulfillment. According to this ideal, fulfillment is felt by many to be achieved to the maximum possession, consumption, display of the latest products and fashions as advertiseD [sic] by the commercial media. The ability of any individual to acquire the status symbols which can engender and sustain the sense of achievement and fulfillment depends naturally on financial income and income at least in most areas of endeavor depends on education, the no nonsense kind of education which will gain acceptance to prestigious colleges and universities which in turn will help obtain the most lucrative positions. We will certainly all agree that a high level of academic and vocational skill is what our public education is mainly about and that the economic base of our society cannot thrive without a highly skilled workforce. Nevertheless, when the material values of what I call the consumer ideal of happiness generate as much surplus anxiety as they do in the United States today then we begin to see the erosion of the public sector, both in government and in the private

voluntary domain. People become less interested and willing to participate or contribute. Voter registration declines. Qualified candidates for public office are difficult to find. Neglect and defacement of public facilities increases. Support for community programs and projects falls on the shoulders of fewer and fewer overworked volunteers. In general, the quality of community life tends to degenerate. Bethlehem has been fortunate in the quality of its citizens and their citizenship. As a result, we have not been afflicted with the more acute symptoms of withdrawal from the community and from the common good. Volunteerism is still strong, especially among older adults and those who became of age before the commercial media because so skilled and commercial values so pervasive. In the Bethlehem Area schools, however, we are addressing the coming generation of adults, most of whom will live out their lives right here in this community. With them, we need to enunciate clearly a new set of values in contradictions to the consumer ideal of happiness and fulfillment. It has been documented many, many times that between the ages of 3 and 18 the average youngster in the United States spends more time watching television than in doing anything else except in sleeping. In the classroom of television, children are learning an array of values which take them away from healthy, social behavior and away from an active concern for their community. I believe that in the classroom of the community which includes our schools but reaches beyond the walls of our schools, it is now imperative that we teach a very different kind of ethic. Thank you."

* * *

Director Trujillo stated, "I too support the community service program as mandatory fundamentally because I believe as Mr. Thompson so eloquently stated that we do have a duty to our community and we do have a responsibility to each other. I know that everyone here tonight believes that as well. The arguments that we have heard against the program didn't have anything to do with bashing volunteerism or community service per se. We also know that if it is not a mandatory program many students if not most students would not get involved. Those who would get involved are the ones who are presently volunteering and the ones who already know the benefits of what it means to give, to share, to learn from community organizations and to have a sense of what is really going on in our society other than the little tidbits of news that we get at 11:00 at night which sensationalize most of what is really happening in our world. Yes, we have a duty to community. We also have a duty to empower other students, our colleagues, our friends who maybe don't understand what it means because they have a low self-esteem. The vocal minority or majority whichever way you want to look at it are a very eloquent group of people who I am sure volunteer many hours and who I am sure truly understand that the difference between an argument for individual liberty and an argument for a big majority of students, the middle number of students, the ones that are borderline, the ones that aren't sure that maybe need a hook in the community in order for them to succeed and achieve in life. Let us not forget those less fortunate than ourselves. Let us not forget that empowerment not only comes from our families; it comes from other sources as well. It comes from our community.

Self-esteem is built up little by little through our growing processes. I think the words of Bob Thompson tonight were very clear and made some of the greatest points about community service. I would hope to see a lot of that in the press so that more people can see the significance of the program. Leo Tolstoy once said that everyone tries to change humanity yet no one tries to change themselves. For those of you against community service, you may say that is our argument. Why are you mandating students? Why are you trying to change humanity? Yet, we know that developmentally people have to gain an understanding of what that means, of values, and our schools do teach values as board members have mentioned. Unfortunately, the values that are being gained through the media and through the video stations on TV are material consumption, self-indulgence and narcissism more and more today. There is little or no connection between theory and practice in our schools. There is a difference between a teacher standing in front of the classroom and saying that we should attempt to do something constructive for our community and a student being out there and seeing misery, seeing poverty, and knowing that they could make a difference perhaps, maybe not directly, but somewhere down the road. I too would like to see a program with more time for reflection. Teachers and counselors, these are the people that make the difference; subjectively, they are the ones who should give time for reflection about their participation in any organization. I hope that ultimately, subjectively, students understand what it means to participate. The only way for them to know that is for them to be able to write about it and think about what they have experienced. I do

support this program. I think that really it is quite ludicrous to compare 60 hours of community service over a three year period to slavery or Nazism. These are topics in our history that were atrocities. They were very serious and they are not to be taken lightly for some argument for 60 hours of community service. I fail to see the analogy. I do support this program. Thank you for your time."

* * *

Supreme Court, U.S.
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No. 92-1983

In The

Supreme Court of the United States

October Term, 1992

LYNN ANN STEIRER, a Minor, by BARBARA and THOMAS STEIRER, as Guardians and in Their Own Right; DAVID STEPHEN MORALIS, a Minor by THOMAS and BARBARA MORALIS, as Guardians and in Their Own Right,

Petitioners,

vs.

BETHLEHEM AREA SCHOOL DISTRICT; THOMAS J. DOLUSIO; ELLEN PAGANO; BARBARA HUTH; JOSEPH McCARTHY; JOHN SPIRK, SR.; RUTH PROSSER; URIEL TRUJILLO; LAWRENCE KISSLINGER; LYNN GLANCY; ROBERT THOMPSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court accept the parents' invitation to this Court to provide an advisory opinion about community service programs?

2. Does the Third Circuit's dismissal of the parents' Thirteenth Amendment claim warrant the granting of the parents' Petition for Writ of Certiorari by this Court?

3. Does the Third Circuit's dismissal of the parents' First Amendment claim warrant the granting of the parents' Petition for Writ of Certiorari by this Court?

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ORDERS BELOW

The School District hereby incorporates by reference the statement of orders below section provided on page 1 of the parents' Petition for Writ of Certiorari as if fully set forth herein.

STATEMENT OF JURISDICTION

The School District hereby incorporates by reference the Statement of Jurisdiction provided on page 1 of the parents' Petition for Writ of Certiorari as if fully set forth herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The School District hereby incorporates by reference the Statement of Constitutional and Statutory Provisions provided on page 1 of the parents' Petition for Writ of Certiorari as if fully set forth herein.

COUNTERSTATEMENT OF FACTS

Petitioners are two sets of parents who reside within the Bethlehem Area School District and their two children, (collectively referred to hereinafter as the "parents"), who attend public schools operated by the Bethlehem Area School District. Respondents are the School District, the members of the Board of School Directors of the School District, and the School District Superintendent (collectively referred to hereinafter as the "School District"), The School District, which is located in Lehigh and Northampton Counties, serves a population of approximately 100,000 and it enrolls approximately 12,000 students, 3,500 of which are high school students.

The School District first began considering adoption of the Community Service Program (hereinafter "the program") in March 1989. After thoroughly researching such a program, conducting numerous meetings, and creating a task force comprised of school board members, administrators, school employees, parents and agency representatives, the School District adopted the program as a component of the high school curriculum of studies on April 30, 1990. The program as adopted requires

students to perform sixty hours of unpaid service to community organizations *or* through individual and independent experiential situations approved by the School District. Students may spread out their service over the four years of high school, or may perform it at one time. Students are afforded several options from which to choose, ranging from tutoring other students to conducting historical research to working with the handicapped, elderly or homeless.

Each student must apply for the particular service activity he or she desires to pursue at a community organization or through an independent project, or through both. The School District utilizes separate application forms for students to use for each kind of service. After the student's selection is approved, he or she must perform the service. If problems arise, the service can be changed. The School District oversees the performance of service. Guidance counselors conduct small group discussions and community service coordinators make regular on-site visitation to observe students personally performing service and to speak with students concerning their experiences. After the students complete their service, they must complete an "experience summary form" to encourage them to reflect upon their experiences. After providing sixty hours of service and completing the paperwork requirements, each student receives .5 units of credit toward the school's credit requirement for high school graduation. The program is "pass/ fail"; no letter grades are given.

Contrary to the parents' allegations, the School District is not forcing the students to endorse or affirm any ideals, beliefs or standards. The parents admitted in their depositions that the students are not asked to adopt or express any particular ideals or beliefs, nor do they have to agree with the program or its objectives.

The program was recommended to advance seventeen

educational purposes. For example, the program is designed to help students learn about the significance of rendering service to their community, to teach students about community organizations, to develop intellectual development in academic learning in such areas as the expression of ideas, reading and record keeping, and to improve the students' self-esteem.

With very limited exception, the parents admitted that the seventeen enumerated objectives were purposes of the program and proper purposes of public school education. In those limited instances in which one or more of the parents expressed the opinion that one of the purposes was not a purpose of the program or was not a proper purpose of public school education, no evidence was presented to support that opinion.

The School District introduced affidavits of several experts to support its position that the program serves legitimate educational objectives. Ernest Boyer, president of the Carnegie Foundation for the Advancement of Teaching, and a former United States Commissioner of Education, advocates community service because of his long-term commitment to high quality public education. Commenting upon the School District's specific program, Dr. Boyer stated in part, "the rationale for the program is educationally sound." Gary Doyle, Deputy Superintendent of the Bloomfield Hill Schools in Bloomfield Hills, Michigan, opined that the mandatory program in his district promotes the same purposes sought to be advanced in the Bethlehem Area School District. Joseph F. Bard, then Acting Commissioner of the Pennsylvania Department of Education, wrote to the School District saying, "I congratulate the Bethlehem Area School Board for their interesting community service and its value to the educational process."

The parents filed their Complaint seeking injunctive and declaratory relief that the School District's program violates their

First, Thirteenth, and Fourteenth Amendment rights under the United States Constitution. The parents' Thirteenth Amendment claim is predicated upon the assertion that the School District's program constitutes involuntary servitude. The parents' First and Fourteenth Amendment claims are predicated upon the assertion that the School District's program forces the students to endorse and affirm ideals, beliefs and standards.

The parties filed cross-motions for summary judgment in the United States District Court for the Eastern District. On March 30, 1992, the District Court granted the School District's motion in all respects. The parents appealed the District Court's decision to the United States Court of Appeals, Third Circuit. On March 15, 1993, the Third Circuit affirmed the decision of the District Court. On June 15, 1993, the parents filed a Petition for Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

The parents contend that this Court should establish constitutional standards governing mandatory community service programs. In effect, the parents are asking that this Court issue an advisory opinion to establish constitutional parameters governing mandatory community service programs. The law is well-established that it is not this Court's function to provide advisory opinions, and this Court should decline the invitation to provide such an opinion on the constitutionality of community service programs.

The parents also contend that the Third Circuit's decision conflicts with the plain language of the Thirteenth Amendment and this Court's precedents in interpreting the First and Thirteenth Amendments. The School District submits that the Third Circuit dismissed the parents' First and Thirteenth Amendment claims in accordance with well-established constitutional law. The Third

Circuit properly found that the School District's community service program does not constitute involuntary servitude and does not force the students to endorse and affirm ideals, beliefs, and standards in contravention of their First Amendment rights.

For these reasons, this Court should deny the parents' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PARENTS' INVITATION TO THIS COURT TO PROVIDE AN ADVISORY OPINION ABOUT COMMUNITY SERVICE PROGRAMS IS INAPPROPRIATE.

The parents posit that this Court should grant its Writ because the School District's program reflects a growing national trend toward community service raising the need for constitutional standards. Couched in the language of Rule 17.1(c) of this Court, the parents contend that the Third Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The School District acknowledges that there is a trend among school districts toward instituting community service programs, but this does not warrant the granting of the parents' Writ so that the Court can establish constitutional standards.

It is beyond cavil that school districts around the country are realizing, like the School District in the instant case, that community service programs serve valuable educational benefits and should be included in their curricula. The parents advance the untenable position that simply because there is a trend toward community service among school districts this Court is obliged to establish constitutional standards. In effect, the parents are asking that this Court issue an advisory opinion to establish constitutional parameters governing mandatory community service programs.

It is well-established that this Court's function is not to provide advisory opinions. *Federal Communications Com. v. Pacifica Foundation,* 438 U.S. 726 (1978); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945). In *Federal Communications Com.*, this Court stated:

> However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions.

438 U.S. at 735.

In *Alabama State Federation of Labor,* this Court declared:

> This Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

325 U.S. at 461-2. (Citations omitted).

In accord with these principles, this Court should decline the invitation to provide an opinion as to the constitutionality of community service programs.

The parents also argue that the one appeals court — the Third Circuit in the instant case — that has addressed the constitutional questions raised by these programs "seriously misconstrued relevant constitutional provisions and this Court's precedents."

(page 5 of the parents' Brief). As discussed herein, the Third Circuit trenchantly analyzed this Court's precedents with respect to the parents' First and Thirteenth Amendment claims and found that the School District's community service program does not constitute involuntary servitude nor does it require the students to affirm ideals, beliefs, and standards. The Third Circuit did not, as the parents spuriously contend, misconstrue relevant constitutional provisions and this Court's precedents, and therefore it is unnecessary for this Court to hear the case.

II.

THIS COURT SHOULD NOT GRANT THE PARENTS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE THIRD CIRCUIT DISMISSED THE PARENTS' THIRTEENTH AMENDMENT CLAIM IN ACCORDANCE WITH WELL-ESTABLISHED CONSTITUTIONAL LAW.

The parents maintain that this Court should grant its Writ because the Third Circuit's decision conflicts with the plain language of the Thirteenth Amendment and this Court's precedents interpreting the Thirteenth Amendment. In effect, the parents take the position that their Writ should be granted because the Third Circuit decided a federal question in a way which conflicts with applicable decisions of this Court. (S. Ct. Rule 17.1(c)). The School District argues that the Third Circuit correctly interpreted the Thirteenth Amendment's language and applicable decisions of this Court, and therefore the parents' Writ should be denied.

The parents first contend that the Third Circuit's decision conflicts with the plain language of the Thirteenth Amendment. An examination of the Amendment's language and applicable cases renders this contention meritless.

Section 1 of the Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, accept as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

In *United States v. Kozminski*, 487 U.S. 931 (1988), this Court crystallized the phrase "involuntary servitude";

> The primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."

487 U.S. at 942.

It is clear from this definition that not every kind of forced work or labor falls within the ambit of the phrase "involuntary servitude"; only those forms akin to African slavery rise to this level. As the Third Circuit noted in its opinion, "modern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement." For example, in *United States v. King*, 840 F.2d 1276 (6th Cir. 1987), a religious cult repeatedly used and threatened the use of physical force to make children perform labor. The Sixth Circuit found this egregious conduct rose to the level of involuntary servitude. Similarly, in *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981), owners of a migrant labor camp forbade farm workers from leaving without paying their debts and enforced this rule by threatening

physical harm to those who attempted to leave. The Fourth Circuit held that this deplorable behavior constituted involuntary servitude.

Conversely, in *Butler v. Perry*, 240 U.S. 328 (1916), the State of Florida required men between the ages of twenty-one and forty-five to perform sixty hours of work on the roads each year. This Court held that such compulsory service did not violate the Thirteenth Amendment and in so doing emphasized that a state should be allowed to require able-bodied men to labor for a reasonable time on public roads without compensation inasmuch as this is a part of the duty which they owed to the public. In the same vein, in *Bobilin v. Board of Education, State of Hawaii*, 403 F. Supp. 1095 (D.C. Hawaii 1985), a school district required students to perform up to seven full days of cafeteria duty in one year. In holding that such a requirement did not constitute involuntary servitude, the court stressed that not all types of forced labor are proscribed by the Thirteenth Amendment.

In the instant case, the School District's mandatory community service program requires that high school students perform sixty hours of community service over a period of four years. The students are afforded a plethora of different types of service from which to choose. They can fulfil their obligation by tutoring other students. Can it seriously be argued that a requirement that students tutor other students in view of the educational benefit to be achieved is prohibited by the Thirteenth Amendment? We suggest not. Clearly, in accord with the cases cited, the Third Circuit properly found that the School District's program does not rise to the level of involuntary servitude.

In finding that the School District's community service program does not constitute involuntary servitude, the Third Circuit emphasized that the program is primarily designed for the students' own educational benefit, notwithstanding some

incidental benefit to the recipients of the services. The parents, however, insist that the Third Circuit misinterpreted the law in arriving at this conclusion. Specifically, the parents argue that the Third Circuit "creates an exception to the prohibition against involuntary servitude for instances in which the government concludes that the involuntary servitude is for the person's own good." (Page 7 of the parents' Brief).

The School District notes, in response to that argument, that there is both a factual and legal basis for the Third Circuit's conclusion. To repeat, the School District instituted the program to satisfy seventeen separate educational goals. Thus, while the recipients of the service are benefited, the chief purpose of the program is to provide educational benefits to the students. As noted in *United States v. Lewis*, 644 F. Supp. 1391 (W.D. Mich. 1986), the determination of whether conduct constitutes involuntary servitude hinges, in part, upon a determination of whose benefit the work is for. Citing numerous cases, the United States District for the Western District of Michigan stated in *Lewis:*

> The very essence of the Thirteenth Amendment is a prohibition against forcing one person to labor against his will *for the benefit of another person.*

644 F. Supp. at 1400. (Emphasis added). Similarly, in *Bobilin, supra,* the court emphasized that many services performed by students, such as erasing blackboards or serving as crosswalk monitors, provide educational benefits for the students:

> These experiences teach not only neatness and responsibility but also civic attitudes fundamental in a collective society where citizens often are called upon to "do his share" without economic compensation.

403 F. Supp. at 1108.

Therefore, contrary to the parents' assertions, it was proper for the Third Circuit to consider that the purpose was to benefit the students in concluding that the School District's community service program does not rise to the level of involuntary servitude.

The parents also argue that it was improper for the Third Circuit to conclude that the program is neither coercive nor involuntary. The parents' argument is disemboweled by a line of cases. In *Lewis, supra,* the court held that a finding of involuntariness requires that the person performing the work against his will, under coercion, and threatened by a superior and overpowering force. In *Watson v. Graves,* 909 F.2d 1549 (5th Cir. 1990), the court added that there is no involuntary servitude when the person performing the work has a choice, even though it is a painful one. The court in *Watson* emphasized that a showing of compulsion is a prerequisite to proof of involuntary servitude.

The case law supports the principle that when those forced to perform work have a choice, regardless of how painful or unattractive that choice is, the work does not rise to the level of involuntary servitude. *See, e.g., International Union v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949) (injunction of strike by State Labor Relations Board was not violative of the Thirteenth Amendment because the employees had the option of quitting their jobs); *Cunningham v. Virginia School of Cosmetology,* 446 F. Supp. 780 (E.D. Va. 1979) (no violation of the Thirteenth Amendment for school to utilize its students as hairdressers for customers because of the students' voluntary choice to enroll in the school); *Audet v. Board of Regents,* 606 F. Supp. 423 (D. R.I. 1985) (state's refusal to allow a teacher to rescind his certification in subjects in which he no longer wished to teach was not violative of the Thirteenth Amendment because the teacher had the choice of not teaching); *Sellers v. Phillips Barber*

Shop, 46 N.J. 340, 217 A.2d 121 (1966) (an order directing a barber to cut the hair of blacks against his will was not violative of the Thirteenth Amendment because the barber had the choice of not continuing the practice of barbering).

In the instant case, the parents have several choices or options. They could enroll their children in any private school or withdraw their children from school and teach them at home. Moreover, they have the choice of continuing public education at the School District without performing the community service. In that event, the students would not graduate from the School District, but they could then obtain a diploma under the Pennsylvania's G.E.D. provisions after complying with certain testing procedures. Although these choices may not seem attractive to the parents, in accord with *Lewis* and *Watson*, these choices remove the involuntary nature of the community service.

To summarize the law, in order for there to be a finding of involuntary servitude, persons must be required to (1) perform labor akin to African slavery (2) for the benefit of others (3) without having any choices. None of these circumstances is present in the instant case. Therefore, contrary to the parents' assertions, the School District has not conditioned receipt of public education on surrendering of the students' constitutional right to be free from involuntary servitude, nor has it deprived the students of the benefit of free, public education.

For all of these reasons, the School District respectfully requests that with respect to the parents' Thirteenth Amendment claim, this Court deny the parents' Petition for Writ of Certiorari.

III.

THIS COURT SHOULD NOT GRANT THE PARENTS' PETITION FOR WRIT OF CERTIORARI BECAUSE THE THIRD CIRCUIT DISMISSED THE PARENTS' FIRST AMENDMENT CLAIM IN ACCORDANCE WITH WELL-ESTABLISHED CONSTITUTIONAL LAW.

The parents also contend that this Court should grant its Writ because the Third Circuit's decision allegedly conflicts with this Court's precedents prohibiting coerced affirmance of beliefs under the First Amendment. Again, the parents are taking the position that their Writ should be granted because the Third Circuit decided a federal question in a way which conflicts with applicable decisions of this Court. (S. Ct. Rule 17.1(c)). The School District argues that the Third Circuit correctly interpreted applicable decisions of this Court and concluded that the community service program does not force the students to endorse and affirm ideals, beliefs, and standards in contravention of their First Amendment rights.

To reiterate, the School District instituted the community service program to advance seventeen educational purposes. These purposes include having students assume responsibility and to accept the consequence of their actions, giving students a sense of appreciation of the worth of community organizations, and giving students the opportunity to explore new roles, identities, and interests.

In attacking the School District's purposes for instituting the community service program, the parents have flagrantly contorted and taken out of context comments made by School District Official Uriel Trujillo.

The parents stated in their brief that:

> The school directors thought that community service was too important to be left to voluntary efforts to help others in an age of "material consumption, self-indulgence and narcissism." Stressing the necessity of community service to cure supposed selfishness and materialism infecting children is a profoundly political statement.

(Pages 9-10 of the parents' Brief).

The School District wishes to make several points in response. First, the School District does not think that community service is "too important to be left to voluntary efforts." To the contrary, the School District believes that performing community service serves valuable educational objectives and every child should be required to perform it. As Mr. Trujillo noted, if the program were not mandatory, many students would not get involved. (Page 59 of the Appendix to the parents' Brief).

Second, Director Trujillo did *not* state that the community service program was designed "to cure selfishness and materialism infecting children." His point was that as a result of reading newspapers and magazines and watching television, young people are exposed, to some degree, to negative values such as selfishness and materialism. The community service program is not designed to "cure" these values, but to advance the seventeen educational purposes referenced earlier, as conceded by the parents.

Third, by requiring the students to perform community service, the School District is not making "a profoundly political statement." To repeat, School District officials believe that performing community service provides valuable educational benefits for the children. By implementing the community service program, the School District is not making any statement whatsoever, let alone a "profoundly political statement."

Along the same lines, the parents argue that the School District's community service program requires students to engage in expressive conduct in contravention of their First Amendment rights. The parents' argument is eviscerated by a long line of decisions rendered by this Court. In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court made clear that there are limitations upon the types of conduct which are afforded First Amendment protection. Citing *United States v. O'Brien*, 391 U.S. 367 (1967) and *Spence v. Washington*, 418 U.S. 405 (1974), this Court declared in *Texas*:

> While we have rejected the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea, we may have acknowledged the conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

491 U.S. at 404.

In the same vein, in *City of Dallas v. Stanglen*, 490 U.S. 19 (1989), the Court noted that:

> It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street, or

> meeting one's friends at a shopping mall, but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

490 U.S. at 25.

Thus, in analyzing a claim brought under the First Amendment, a court must determine whether the conduct complained of is inbued with elements of communication and whether it manifests an intent to convey a particularized message. The court, of course, must be mindful that a finding of some kernel of expression in conduct is not tantamount to a finding that the conduct is afforded First Amendment protection.

In several cases, this Court has found a First Amendment violation because the conduct complained of was imbued with elements of communication and manifested an intent to convey a particularlized message. *See, e.g., Tinker v. DesMoines Independent Community School District*, 393 U.S. 503 (1969) (public school students were suspended for wearing armbands to protest the government's policy in Vietnam); *Wooley v. Maryland*, 430 U.S. 705 (1977) (state required that a person display its motto "Live Free or Die," as embossed on cars' license plates); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (school board adopted a resolution requiring public school pupils to salute the flag while reciting a pledge of allegiance under the penalty of expulsion).

The parents argue that "the facts of *Barnette* are remarkably similar to those of the instant case" and "whether through forced flag salutes in *Barnette* or forced community service in the instant case, school directors are prescribing a political orthodoxy and compelling the students to submit to that philosophy." (page 10 of the parents' Brief). The School District argues and the Third

Circuit so held, that unlike the flag salute in *Barnette*, performing the community service lacks the necessary expressive component to rise to the level of a First Amendment violation. In arriving at this conclusion, the Third Circuit made several salient points.

First, the Third Circuit emphasized that in determining whether conduct is expressive, it is important to examine the viewers' perception of the activity. Citing several cases, the Third Circuit noted that participating in a civil rights march, burning a draft card to protest the war, and labor picketing are activities afforded First Amendment protection in part because people observing the conduct would see it as the expression of a particularized message. In the instant case, the parents failed to produce any evidence that people in the community who see the students performing community service would perceive their actions as an intended expression of a particularized message of their belief in the value of community service and altruism. As the Third Circuit aptly stated, it is just as likely that students performing the commuity service would be viewed merely as students completing their high school graduation requirements.

The Third Circuit also observed in its opinion that under some circumstances, a school-imposed community service program could constitute expressive conduct implicating First Amendment considerations. For example, a student required to provide community service to an organization whose message conflicted with the student's opposing views could have a tenable First Amendment claim. In the instant case, however, it is important that students have a multiplicity of options which allows them to provide services to organizations with a wide range of political, religious, and moral views. Students' options include, *inter alia*, conducting historical research, tutoring other students, and working with the handicapped, elderly, or homeless.

However, the parents intimate in their Brief that students are

not afforded a wide variety of options from which to choose, when they state, citing in part the Third Circuit's opinion, that "students' choices are limited to organizations that (1) demonstrate their intention to promote the welfare of the community; (2) do not 'discriminate against any race, religion, or sex'; and (3) provide assurances that the organization is 'free from doctrinal motivation.' " (page 12 of the parents' Brief). This representation is false. Students do not have to provide service to any organization, but may provide an independent service.

Furthermore, in administering the program, the School District maintains a list of more than seventy approved community service organizations and students and parents may submit names or other potential organization to the District Coordinator for approval. Accordingly, the parents' suggestion that the students have "limited" options is meritless.

Moreover, and of critical importance, the parents unanimously agreed that the School District's program does not compel the students to endorse or affirm any ideals, beliefs, or standards.

Barbara Steirer admitted:

> Q. They can perform the service and willingly express their opinion if they think it's a ridiculous program and still pass, can't they?
>
> A. If they do it, they pass, if they don't do it —.
>
> Q. But they could express and hold to any ideal and belief they want to and still pass; isn't that correct?
>
> A. Yes, I guess their own idea.

Thomas Steirer concurred with his wife:

> Q. The students will not be asked to adopt or express any particular ideal or belief in order to pass, they just have to select a service, perform it, document it, and complete the summary experience forms; isn't that true?
>
> A. Yes.

Barbara Moralis testified:

> Q. Do you have any evidence that a child will have to believe in the objectives and purposes of the progam in order to pass it?
>
> A. We see nothing yet.
>
> Q. Do you have any evidence?
>
> A. Not yet.
>
> Q. Do you have any evidence that a child will have to say it agrees with the purposes in order to pass it?
>
> A. Not yet.

Similarly, Thomas Moralis stated:

> Q. And isn't it true that students will not be asked to adopt or express any particular ideals or beliefs in order to pass?

A. That is as stated in the curriculum guide.

Q. And a child does not have to agree with the program in order to pass it, does he?

A. As far as I know, no.

Q. The child does not have to believe in objectives of the program in order to pass it, does he?

A. As far as I know, again, at this point, no.

Therefore, the parents' contention that the program forces the children to endorse or affirm any ideals, beliefs or standards is untenable.

In sum, in order for conduct to be afforded First Amendment protection, it must be imbued with elements of communication and must manifest an intent to convey a particularized message. Unlike the conduct in *Barnette, Tinker,* and *Wooley,* the mandatory community service program in the instant case is not imbued with the requisite elements of communication, and the performance of such service does not convey a particularized message. The students are afforded a multitude of options, including independent projects, and therefore would not have to provide service to an organization whose message conflicted with theirs. The students are not required to affirm beliefs, ideals, or standards, nor would people in the community view them as affirming beliefs, ideals, or standards. Thus, contrary to the assertions of the parents, the School District is not conditioning the receipt of a publicly provided education on the surrender of the First Amendment right to be free of coerced affirmation of belief. Indeed, the students are surrendering no First Amendment rights by performing community service.

For all these reasons, the School District respectfully requests that with respect to the parents' First Amendment claim, this Court deny the parents' Petition for Writ of Certiorari.

CONCLUSION

The Third Circuit did not decide a federal question in a way which conflicts with applicable decisions of this Court, nor did it decide an important question of federal law which has not been, but should be, settled by this Court.

The Third Circuit dismissed the parents' First and Thirteenth Amendment claims in accordance with well-established constitutional law. Moreover, it is unnecessary for this Court to establish constitutional standards governing mandatory community service programs. Accordingly, the School District respectfully requests that this Court deny the parents' Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1983

In The

Supreme Court of the United States

October Term, 1993

LYNN ANN STEIRER, a Minor, by BARBARA and THOMAS STEIRER, as Guardians and in Their Own Right; DAVID STEPHEN MORALIS, a Minor, by THOMAS and BARBARA MORALIS, as Guardians and in Their Own Right,

Petitioners,

v.

BETHLEHEM AREA SCHOOL DISTRICT; THOMAS J. DOLUSIO; ELLEN PAGANO; BARBARA HUTH; JOSEPH McCARTHY; JOHN SPIRK, SR.; RUTH PROSSER; URIEL TRUJILLO; LAWRENCE KISSLINGER; LYNN GLANCY; ROBERT THOMPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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1. Respondents quite remarkably contend that petitioners are asking this Court to issue an advisory opinion about the constitutionality of community service programs. Br. in Opp. 6-8. To determine whether a case involves an advisory opinion, "the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment [as opposed to an advisory opinion]." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The dispute in this case plainly satisfies this standard. The parents and students challenging the mandatory community service program are presently subject to its requirements. Indeed, the students' successful completion of high school hangs in the balance due to the school board's refusal to allow students to opt out of a program that violates fundamental constitutional liberties. The potential withholding of publicly provided education is clearly of sufficient "immediacy and reality" to satisfy the test of whether a "substantial" controversy exists in the instant case.

2. Respondents seek to diminish the distinction between slavery and involuntary servitude drawn by the plain language of the Thirteenth Amendment by arguing that "not every kind of forced work or labor falls within the ambit of the phrase 'involuntary servitude'; only those forms akin to African slavery rise to this level." Br. in Opp. 9. Respondents ignore, however, that the "contours of slavery have shifted since the enactment of the Thirteenth Amendment. [citations omitted] No longer is the slave always black and the master white." *United States v. Lewis*, 644 F. Supp. 1391, 1400 (W.D. Mich. 1986).

Recently, the prohibition against involuntary servitude contained in the Thirteenth Amendment has been extended to such situations as patients in mental hospitals and juveniles in youth centers. *See, e.g., Downs v. Dept. of Public Welfare*, 368 F. Supp. 454 (E.D. Pa. 1973); *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975). Throughout its contemporary manifestations, the definition of involuntary servitude has remained constant: "a condition of enforced compulsory service of one to another." *Hodges v. United States*, 203 U.S. 1, 16 (1906). The mandatory community service program administered by respondents aptly fits this definition by requiring students to "provide services to the community without receiving pay" in order to obtain a high school diploma. *Steirer v. Bethlehem Area School District*, 987 F.2d 989, 991 (3d Cir. 1993) (App. 4).

Respondents attempt to liken the services required by the community service program to other types of labor held by this Court not to constitute involuntary servitude. Br. in Opp. 9-11. In *United States v. Kozminski*, 487 U.S. 931, 944 (1988), this Court recognized two situations in which coerced labor does not amount to involuntary servitude: (1) the performance of certain "public" duties, such as compulsory military service or roadwork, and (2) "exceptional" cases well established in the common law at the time of the Thirteenth Amendment's passage, such as laws preventing contracted sailors from deserting their ships. Respondents' mandatory community service program does not fall within either of these exceptions to the prohibition on involuntary servitude.

The beneficiaries of respondents' community service program are community service organizations that receive the benefit of free labor or, as respondents claim,

the students themselves (presumably, even those who object to participation in the program). Either way, the program does not constitute one of the "civic" exceptions recognized by this Court whereby the beneficiary of the program is the general public through such endeavors as the defense of the nation or the building of public roadways. Furthermore, the community service program is not one of the common law "exceptions" to the prohibition on involuntary servitude, but rather closely resembles a contemporary, more subtle form of servitude described in *Lewis*.

In describing the make-up of the mandatory service program (Br. in Opp. 10), respondents focus on the nature of the tasks performed under the program, most notably the "option" of tutoring other students in order to fulfill the requirements of community service. Under Thirteenth Amendment analysis, however, the inquiry is not focused on the nature of the work performed, but rather on the penalties or consequences of not performing the required services. *Kozminski, supra; United States v. King*, 840 F.2d 1276, 1280-81 (6th Cir. 1988). Indeed, many tasks performed by individuals conscripted into servitude or even slavery were of a relatively benign nature, such as serving as a butler or house musician. Likewise, in the instant case, though the work performed may be benign, the consequence of not performing mandatory community service is the withholding of the most important public benefit an individual can obtain: a high school diploma.

The sole reason given by respondents as to why mandatory community service does not constitute involuntary servitude is that students have the option of either quitting the public schools or completing high school, but not graduating. Br. in Opp. 13. In comparing mandatory

community service for public high school students to training requirements for such professionals as attorneys and teachers, respondents ignore several vital distinctions between career choices of adults and the "options" faced by non-majority age public high school students. Clearly, the choices faced by adults deciding to enter into a career and thereby accepting certain obligations are quite distinct from a minor facing the prospect of participating in a required program that violates his fundamental beliefs or being denied publicly provided education.

The "options" offered by respondents for students who object to mandatory participation in community service are further restricted by Pennsylvania's compulsory school attendance laws that apply to at least half the students in respondents' school district who are subject to the program and can not quit school without facing legal penalty. *See* 24 Pa. Cons. Stat. §§ 13-1327, 13-1333, 13-1343. Furthermore, unlike adults who can presumably participate in democratic processes for determining occupational requirements, students subjected to coerced mandatory service, because they are below the age of majority, did not participate in the crafting of the program and can not even object to it at the ballot box. Despite these circumstances, students are forced to make a Hobson's choice wherein they submit to the requirements or they are denied educational opportunities.

Apart from the lack of any practical or feasible alternatives offered to students who object to mandatory community service, the "options" presented by the school district to preserve the voluntariness of the program can not withstand judicial scrutiny. If the sole measurement of the degree of voluntariness is the option of discontinuing education at respondents' schools, then the school

district could require virtually any "service" and students could not state a claim under the Thirteenth Amendment.

For instance, under respondents' analysis, the school district could institute a program that would require students to perform manual labor on a new addition to the school or perhaps the private homes of the school directors. This program could be justified on the basis that the educational goals of the program were for students to learn good work habits or important construction skills with only incidental benefits going to either the school district or public officials. Furthermore, respondents could not distinguish this hypothetical program from the current community service plan on the basis that mandatory community service offers students a "plethora of different types of service from which to choose." Br. in Opp. 10. Petitioners' objection to mandatory community service lies not with inadequate service options, but rather with its coercive and involuntary nature.

Therefore, under the Thirteenth Amendment analysis urged upon this Court by respondents, students could be drafted into any type of servitude the school district deemed appropriate and could not claim that it was involuntary because they could always quit school or continue school and not receive a diploma. Respondents' argument and the lower court's adoption of it drains the Thirteenth Amendment of any meaning as it applies to public school students and merits review by this Court.

3. Respondents also fail in their defense of the court of appeals' holding that mandatory community service as applied to petitioners does not constitute compelled affirmance of belief in violation of the First and Fourteenth Amendments to the United States Constitution. In support of the court of appeals' ruling, respondents argue

that petitioners can not state a claim under the First Amendment because community service is not expressive conduct protected by the First Amendment. Br. in Opp. 17-22. Normally, service in the community, like other activities such as standing, sleeping, or walking, would not display the necessary expressive elements to give rise to a First Amendment issue. *See City of Dallas v. Stanglen*, 490 U.S. 19, 25 (1989).

In the instant case, the mandatory nature of the community service program, in addition to the surrounding statements made by school officials as to why participation in the program is required, constitutes expressive activity under the First Amendment. As this Court recognized in *Clark v. Community Center for Creative Non-Violence*, 468 U.S. 288 (1984), while sleeping is not usually associated with expressive conduct, sleeping in a public park in order to protest homelessness changes the nature of the conduct and thereby brings the conduct within the ambit of the First Amendment. Likewise, while standing is not usually considered protected First Amendment activity, a requirement that individuals stand while the Pledge of Allegiance is being recited also raises First Amendment considerations. *See Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978). The school district claims that coerced community service does not constitute expressive activity because students can voice opposition to the notion of community service and that individuals who see students performing community service would not normally perceive their actions as supporting coerced community service. Br. in Opp. 18. Both defenses are unpersuasive under this Court's First Amendment jurisprudence.

Suppose respondents instituted a program to raise student consciousness about the homeless by decreeing that all students must spend a night outdoors in a public park and sleep alongside the homeless. In support of this mandatory program, the school district devised several educational objectives, including the goal that all students be made aware of this societal problem and understand their responsibilities in addressing this issue.[1] Students who objected to the school district's program of mandatory overnight stays in public parks could publicly state their opposition to the program or do so in written evaluation forms. Furthermore, individuals who see the students sleeping alongside the homeless may either perceive them as students fulfilling graduation requirements or even as genuinely homeless. Nevertheless, such a mandatory program and the activity of sleeping outdoors would doubtless raise serious constitutional questions if individual students objected to the school districts' beliefs about homelessness and did not want to sleep outdoors in order to become better acquainted with the issue. The mandatory community service program in the instant case is no different in degree or kind from the hypothetical program presented and likewise brings what would not normally be expressive activity within the protection of the First Amendment.

In demonstrating the ideological nature of the mandatory community service program, respondents object to

---

[1] Compare the objectives of this hypothetical program to two of the objectives of the mandatory community service program: "f. To give students a sense of appreciation of the worth of community organizations; g. To help students understand their responsibilities as citizens in dealing with community issues." *Steirer*, 789 F. Supp. 1337, 1339 (E.D. Pa. 1992) (App. 32).

the use of statements by public school officials supporting the adoption of the program. Br. in Opp. 14-15.[2] When determining whether school officials act in accordance with constitutional guarantees, it is proper to examine the statements and "value-laden" comments made by school officials and others when the program at issue was debated. *Pratt v. Ind. Sch. Dist. No. 831, Forest Lake*, 670 F.2d 771, 777 (8th Cir. 1982) (upholding a district court's use of transcripts of two public meetings to deduce a school board's reasons for its decision); *see also Board of Education v. Pico*, 457 U.S. 853 (1982). Respondents in the instant case revealed their explicitly ideological reasons for supporting the concept of mandatory community service. *See* App. 54-61. Of course, the school directors have a First Amendment right to make such statements. However, respondents went on to require that all students act in accordance with those beliefs by mandating community service for all students in direct contravention to petitioners' sincerely held belief that efforts to help others must be voluntarily chosen.

Although school officials have wide latitude in determining the content of educational programs, those programs must comport with constitutional guarantees. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("the vigilant protection of constitutional freedoms is nowhere more

---

[2] Respondents also object to the characterization of the community service program as setting limits as to what types of organizations can be involved in the program. Br. in Opp. 18-19. While it is true that a student does not have to work for an organization and can instead participate in an "experiential" program, if a student does wish to work for an organization, it must be "free from doctrinal motivation," among meeting other qualifications. *Steirer*, 987 F.2d at 991 (App. 5).

vital than in the community of American schools"). In *Lee v. Weisman*, 112 S.Ct. 2649, 2658 (1992), this Court exercised particular sensitivity to freedom of conscience for school children by recognizing "heightened concerns for protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." Rejecting school officials' arguments that prayers at graduation ceremonies were not coercive because students did not have to attend the ceremony or could leave during the prayer, this Court noted that

> the government may no more use social pressure to enforce orthodoxy than it may use more direct means. . . . Attendance may not be required by official degree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Weisman at 2659.

In the instant case, the school officials do not even employ the subtle pressure illustrated in *Weisman*. Instead, the "direct" means of enforcing orthodoxy by respondents is explicitly threatening to withhold a high school diploma for students who, by the dictates of their own conscience, will not participate in coerced community service. Br. in Opp. 13. This blatant conditioning of the receipt of the most tangible and important benefit conferred by the state upon the forfeiting of First Amendment rights raises serious constitutional questions. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sinderman*, 408 U.S. 564 (1972).

CONCLUSION

Petitioners have sought from the initiation of this litigation merely to opt out of a program that violates fundamental constitutional liberties. Respondents' program denies petitioners their Thirteenth Amendment right to be free from involuntary servitude and their First Amendment right to be free from compelled affirmance of belief. Furthermore, respondents' program is typical of similar programs at an increasing number of public schools throughout the country in which clear constitutional parameters have yet to be determined. For the foregoing reasons and those previously stated in the petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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